(36,560)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 746

R. S. STERLING, GOVERNOR OF THE STATE OF TEXAS; JACOB F. WOLTERS, BRIGADIER GENERAL, ETC., ET AL., APPELLANTS,

vs.

E. CONSTANTIN ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS

INDEX

	Original	Print
Record from district court of the United States, Eastern Texas	1	1
Caption.....(omitted in printing)	1	
Original bill of complaint	2	1
First amended original bill of complaint	29	19
Amendment to bill of complaint	72	48
First supplemental petition responding to defendants' answer	74	49
Answer of defendants R. S. Sterling et al	84	55
Exhibit "A"—Proclamation by Governor of Texas	134	90
Exhibit "B"—Order from Governor of Texas to Brig. Gen. Jacob F. Wolters, October 29, 1931	140	93
Exhibit "C"—Order from Governor of Texas to Brig. Gen. Jacob F. Wolters, November 6, 1931	142	95
Exhibit "D"—Order from Governor of Texas to Brig. Gen. Jacob F. Wolters, December 10, 1931	143	96

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	Original	Print
Answer of defendants C. V. Terrell et al	145	96
Motion of defendants R. S. Sterling et al. for leave to amend answer	151	100
Decree granting interlocutory injunction	155	102
Opinion, Hutcheson, J	157	103
Narrative statement of evidence	197	132
Caption	197	132
Appearances of counsel	197	132
Colloquy between court and counsel	198	132
Offers in evidence:		
Letter from Governor Murray to Governor Sterling	260	170
Reply of Governor Sterling to Governor Murray	261	171
Agreement made at Fort Worth meeting	262	171
Telegram from Fort Worth meeting to President	263	172
Testimony of R. S. Sterling	264	173
Offers in evidence:		
Report of secretary of Fort Worth meeting	264	173
Report of meeting of Oil States Advisory Committee at Texarkana on March 9, 1931	270	177
Letter from R. R. Penn to Governor Sterling	282	184
Letter to Secretary of Interior	284	186
Report of Voluntary Committte on Petroleum Economics	289	189
Report of April 15, 1931, meeting	296	193
Letter from Governor Murray to Governor Sterling of date April 18, 1931	301	196
Testimony of Lon A. Smith	306	200
Offers in evidence:		
Order of Railroad Commission, September 2, 1931	319	208
Order of Railroad Commission, September 18, 1931	330	215
Order of Railroad Commission, October 10, 1931	333	217
General Order No. 12 of General Wolters	335	218
Memorandum of General Wolters, October 2, 1931	337	219
Order of Governor Sterling, October 29, 1931	338	220
Order of Governor Sterling, November 6, 1931	340	221
Order of Governor Sterling, December 10, 1931	342	222
Text of World Oil Stabilization program	343	223

	Original	Print
Testimony of R. S. Sterling (cross-examination)..	359	233
Offers in evidence:		
Telegram from Governor Sterling to President Hoover of March 5, 1931.....	360	234
Letter from President Hoover to Governor Sterling of March 10, 1931.....	361	234
Telegram to Secretary of Commerce, March 23, 1931.....	361	235
Telegram from Assistant to Secretary of Commerce to Governor Sterling, March 23, 1931	362	235
Petitions	365	237
Telegram to Governor Sterling, August 14, 1931	369	240
Telegram to Governor Sterling, September 1, 1931.....	377	245
Resolution of Longview Chamber of Commerce	378	245
Letter from county judge, Gregg County, November 6, 1931.....	381	247
Letter from General Wolters, October 20, 1931	382	248
Memoranda from General Wolters.....	387	251
Letter to Governor Sterling from unnamed party	413	268
Newspaper clipping.....	414	268
Message from Railroad Commission to Governor	415	269
Testimony of Lon A. Smith (cross-examination)....	420	272
Charles Roeser.....	422	273
C. V. Terrell.....	423	274
R. D. Parker.....	427	276
Jacob F. Wolters.....	437	281
Colloquy between court and counsel.....	481	309
Respondents' Exhibit 10—Affidavit of James V. Allred	493	317
Testimony of J. R. Pearson.....	496	318
William G. Johnson.....	522	335
Manuel T. Gonzales.....	525	337
Col. Louis S. Davidson.....	541	347
W. W. Sterling.....	560	359
J. W. Fitzgerald.....	567	363
Ross S. Sterling.....	575	368
Offers in evidence:		
Message from Railroad Commission, May 19, 1931.....	586	376
Letter from Kansas commissioner, November 12, 1931.....	595	381
Reply of Governor Sterling, November 17, 1931	597	382

	Original	Print
Stipulation re statement of evidence	613	392
Order approving statement of evidence	613	392
Assignments of error	615	393
Petition for appeal	619	396
Order allowing appeal	620	397
Bond on appeal (omitted in printing)	621	
Petition for stay of injunction and order denying same	624	398
Agreement as to record	627	399
Waiver of citation	629	400
Clerk's certificate (omitted in printing)	630	
Bond on injunction	631	401
Statement of points to be relied upon and designation to print entire record	634	402

[fol. 1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION

No. 365

E. CONSTANTIN et al.

vs.

LON SMITH et al.

ORIGINAL BILL OF COMPLAINT—Filed Oct. 13, 1931

To the Hon. Randolph Bryant, Judge of said Court:

E. Constantin, Brock-Lee Oil Company, J. D. Wrather, as plaintiffs in this cause, complain of the defendants named below:

The plaintiffs E. Constantin and J. D. Wrather are citizens of the State of Texas, and the Brock-Lee Oil Company is a corporation organized under and by virtue of the laws of the State of Delaware, with a permit to do business in the State of Texas, and of whom T. B. Cochran is the President and managing officer.

The defendant Lon Smith is a resident of Henderson, Rusk County, Texas, within the Eastern Division of Texas, Tyler Division.

The defendant C. V. Terrill is a resident of Austin, Travis County, Texas.

The defendant Pat M. Neff is a resident of Waco, McLennan County, Texas, and temporarily to be found in Austin, Travis County, Texas.

[fol. 3] All of the three above named defendants constitute and are the duly qualified and acting Railroad Commissioners of the State of Texas.

The defendant A. B. Capers is a resident of and may be found at Henderson in Rusk County, Texas, and is a representative of the Railroad Commission of Texas, whose duties require the supervision, as will be more particularly hereinafter set out, of the so-called "East Texas Oil Field,"

located in Henderson, Rusk and Smith Counties, within the Eastern District of Texas, Tyler Division.

The defendant James V. Allred is the Attorney General of the State of Texas, and resides in Austin, Texas.

The defendant Jake Wolters is a resident of Texas, and may be found at Kilgore, Rusk County, Texas.

The defendant V. McDavid is County Attorney of Rusk County, Texas, and resides at the county seat thereof, Henderson, Texas.

And for cause of action plaintiffs respectfully allege:

I

That this action involves more than the sum of $3,000.00, exclusive of interest and costs, and the solutions of the questions presented require the interpretation and construction of the Constitution of the United States and the laws made in pursuance thereof, in that:

(1) The Act passed by the 42nd Legislature of the State of Texas at the First Called Session thereof, known as Chapter 26 and House Bill 25, relating to the powers and duties of the Railroad Commission in respect to the conser- [fol. 4] vation of oil and gas, and all things and acts done by the members of the Railroad Commission of Texas and their representatives in pursuance thereof, as more particularly hereinafter set out, were pretended to be under the authority of the State of Texas, but were and are really in contravention of the Constitution of the United States, and therefore null and void, because:

(a) Said actions and pretenses were and are repugnant to Article 1, Section 10, of the Constitution of the United States, prohibiting the State of Texas from passing any law impairing the obligation of contracts.

(b) Said acts and pretenses were and are repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States, prohibiting the State of Texas from depriving any person of liberty and/or property without due process of law, denying to any person within its jurisdiction equal protection.

(c) Such acts and pretenses as will be more fully hereinafter set out amount to the taking or damaging of property for a public use without compensation, contrary to the Con-

stitution of the United States and the laws made in pursuance thereof.

(2) Said acts and pretenses of the defendants herein, and the threatened acts and pretenses, all of which will be hereinafter set out, are contrary to the Constitution of the United States, in that same are arbitrary, capricious and unjust to these plaintiffs and contrary to the Fourteenth Amendment of the Constitution of the United States.

[fol. 5] (3) Said acts and pretenses are purportedly undertaken, as will be hereinafter more fully set out, under a purported, and in accordance with, an Act of the 42nd Legislature of the State of Texas, relating to the powers and duties of the Railroad Commission, and known as House Bill No. 25, which said Act is so indefinite, uncertain and ambiguous as to render same unconstitutional, void and contrary to the Constitution of the State of Texas, and in violation of the Fourteenth Amendment to the Constitution of the United States, and has deprived these plaintiffs of their liberty and property without due process of law and denying to them the equal protection of the law.

II

Heretofore, on or about, and continuously since, the 1st day of September, A. D. 1931, the plaintiffs were the owners of the oil and gas and mineral estate of, and had the claims, powers, privileges and immunities of taking and owning the oil and gas and minerals out of and from the following described lands, in the amounts and proportions as hereinafter set out:

Tract No. 1

E. Constantin owns and claims and undivided one-half interest in the oil and gas lease on the following described tract of land in Rusk County, Texas:

Beginning at the northwest corner of 56.5 acre tract in the F. Cordova League, described in lease given by W. P. Brett and wife, M. A. Brett, to C. M. Joiner, Trustee, dated [fol. 6] March 29, 1927, recorded in Volume 132, Pages 173-4, of the Deed Records of Rusk County, Texas; thence south 103 varas; thence east to a point in public road which is the East line of said 56.5 acre tract; thence in a northerly direction with said road to a point where said road

crosses the north line of said 56.5 acre tract; thence west with said north line 555 varas to the place of beginning, containing 10 acres.

Tract No. 2

E. Constantin also owns and claims an undivided one-half interest in the following described land out of the Juan Ximines Survey in Rusk County, Texas:

The northwest 10 acres of the east 40 acres of that certain 121.6 acre tract known as the A. J. Deason Farm, and being the same northwest 10 acres described in that certain assignment of oil and gas lease executed by E. G. Mannan to W. P. Luse, dated October 13, 1930, and shown of record in Volume 156, Page 389, of the Deed Records of Rusk County, Texas; and a strip of land 60 feet in width across the entire north end of the southwest 10 acres of the east 40 acres of said 121.6 acre tract, containing in and all 11 acres of land, more or less.

Tract No. 3

J. D. Wrather owns and claims a seven-eighths oil and gas leasehold interest in and to the 10 acres of the east 25 acres [fol. 7] of the following described 50 acre tract of land in Rusk County, Texas:

Being 50 acres of land, more or less, a part of the Francisco Cordova League; Beginning at the northwest corner, a stake, a Pine S. 15½ 19 lengths; thence south 18-44/100 chains, a stake Black Jack 72¾ West 8 lengths; thence to the London and Overton road; thence northwest with the London and Overton public road to the N. B. line of the tract of land sold to G. W. Eaton by the Estes heirs; thence west to the place of beginning, and containing 50 acres of land, more or less, of the west portion of the M. Estes homestead, fully described in a deed from C. A. Waker and wife to J. D. Cones, as appears of record in Volume 121, page 399, of the Deed Records of Rusk County, Texas.

Tract No. 4

Brock-Lee Oil Company owns and claims a seven-eighths (⅞) interest in the following described tract of land located in Rusk County, Texas:

Being the south 11.1948 acres of the north 26.0284 acres of the following described lease: Being a part of the Robt. W. Smith Survey, and being known as the old Brock Farm, located about four miles northeast of Overton, and described by metes and bounds as follows:

Beginning at the northwest corner of a 4½ acre Survey for Andy Givens from a stake from which a dogwood 4 in. brs. W. 762 vrs. an iron wood 3 in. dia. brs. 3.60 E. 3 vrs; thence north 966 vrs. to a stake from which a white oak 6 in. [fol. 8] dia. brs. 3.80 E. 5/10 vrs; thence E. 344 vrs. to a corner; thence S. 966 vrs. to a corner. Thence W. to beginning, making 59.92 acres, more or less.

Tract No. 5

Brock-Lee Oil Company owns and claims a seven-eighth (⅞) interest in the following described tract in Rusk County, Texas:

Being a part of the George Berry Survey in Rusk County, Texas, more particularly described as being 50 acres of land, more or less, of the George Berry headright of 100 acres: Beginning half way of the E and W line of that 100 acre Survey stake from which a sweet gum 13 in. brs. S. 69 W. 8-5/10 vrs, a hickory 9 in. brs. S. 60 W. 6-5/10 vrs; thence S. 666½ vrs. stake from which Hick 8 brs. N. 50 E. 3 vrs.; Post Oak 11" brs. S. 70, W. 6 vrs; thence E. 419¾ vrs. stake from which Blk. Jk. 10 brs. S. 60-66 vrs. Sweet Gum 3 brs. S. 25 W. 2 vrs; thence N. 666½ vrs. to stake from which a Red Oak 20 in. brs. E. 3 vrs. another 14 in. brs. W. 4 vrs; thence W. 419¾ vrs. to place of beginning.

III

At such time the plaintiffs, as their interest may appear hereinabove, had and still have the right of doing all acts and things under and upon said land that would enable plaintiffs to exercise said ownership and said claims, powers [fol. 9] and immunities in the production of oil and/or gas therefrom.

IV

Heretofore, during and prior to the year 1867, all of the fee simple estate of the above described lands was owned by the State of Texas, and during and shortly after such

time the State of Texas, by its lawful authorities, for a good and valuable consideration, did obligate itself by contract to convey and grant, and did, for a good and valuable consideration, convey and grant such fee simple estate unto a person or persons, their heirs, assigns and legal representatives, under whom plaintiffs deraigned title to said mineral estate as hereinbefore set out, and said claims, powers, privileges and immunities, and to perform such necessary acts. And, thereafter, during the year 1869, and again during the year 1876, the State of Texas by constitutional provisions then adopted, expressly relinquished unto these soil owners any claims to any right, title or interest of the State of Texas in, to and against, and with respect to, any and all minerals in and under, or that might be produced from the lands hereinbefore described. By said contract and obligation and constitutional act, the ownership of said land, including the minerals thereof, was fully and completely divested out of the State of Texas and vested in said person and persons, their heirs, assigns and legal representatives to whom same was granted by the State of Texas aforesaid; and from whom said plaintiffs by mesne conveyances and transfers deraigned the rights under said obligation of the State of Texas, as well as title to said mineral estate, and said claims, powers, [fol. 10] privileges and immunities and to perform necessary acts thereof.

V

In contravention of the Constitution of the State of Texas and the laws passed by the Legislature of Texas in pursuance thereof creating a Railroad Commission, the Forty-second Legislature of Texas, at its First Called Session, passed an Act known as House Bill No. 25, relating to the powers and duties of the Railroad Commission of Texas in respect to the conservation of oil and gas, which said Act is hereby referred to as an exhibit of this petition, and shall be taken as a part thereof as fully as if same were copied into the face of this petition.

VI

By said Act the Legislature of Texas added to the other duties to be performed by the Railroad Commission of Texas, the duty to regulate the production of oil and/or

gas within the State of Texas; and by Article 6104 thereof it was provided that neither gas nor crude petroleum shall be produced, transported, stored or used in such manner or under such conditions as to constitute "waste"; provided, however, that this shall not be considered to mean economic waste, and the Railroad Commission should have no power to attempt, by order or otherwise, directly or indirectly, to limit the production of oil to equal the existing market demand for oil. As used in said Act, the term [fol. 11] "Waste," in addition to its ordinary meaning, was intended (and so provided) to include:

(a) The operation of any oil well or wells with a gas-oil ratio exceeding that fixed for such well or wells by order of the Commission, and the Commission is hereby given authority to fix and determine by order such ratio.

(b) Drowning with water of any stratum capable of producing oil or gas or both oil and gas in paying quantities.

(c) Underground waste caused by the premature intrusion of water into any producing well or wells producing from the same stratum, resulting from improper drilling or producing methods by the owner of such well or wells.

(d) Permitting any natural gas well to wastefully burn.

(e) The wasteful utilization of natural gas; provided, however, the utilization of gas from a well producing both oil and gas, for manufacturing natural gasoline, shall not be construed to be waste.

(f) The creating of unnecessary fire hazards.

(g) Actual physical waste incident to or resulting from so drilling, equipping, locating, spacing, or operating wells as to reduce, or tend to reduce, the ultimate total recovery of crude petroleum oil or natural gas from any well or pool.

(h) Waste incident to or resulting from the unnecessary, inefficient, excessive or improper use of the gas, gas energy, or water drive in any well or pool; however, it is not the [fol. 12] intent of this Act to require repressuring of an oil pool, or that the separately owned properties in any pool be unitized under one management, control or ownership.

(i) Surface waste, including unnecessary or excessive surface losses or destruction of crude petroleum oil or natural gas without beneficial use.

(j) The escape into the open air of natural gas except as may be necessary in the drilling or operation of a well; this section shall be cumulative of and not contrary to the above definitions of waste, and shall not be construed to conflict therewith.

(k) Waste incident to the inequitable utilization of gas energy, water drive, or other natural force, resulting from the inequitable withdrawal from any common pool; provided, however, that the Commission shall only invoke this definition of waste for the purpose of preventing discrimination in producing as between producers disposing of their oil and/or gas by means of regulated carriers and those producers disposing of their oil and/or gas by means of unregulated carriers.

It was further provided under said Article that nothing in that Act should require the owner of any gas and/or oil well to curtail the production thereof, unless same is being operated in such manner as to constitute or contribute to waste as hereinbefore defined.

[fol. 13]

VII

By Article 6036, in addition to the penalty which might be imposed for contempt for violation of the orders of the Railroad Commission, it was provided that any violation of the provisions of that Act or any of the rules, regulations or orders made in pursuance thereof, should subject the violator thereof to a penalty of not more than $1,000.00 for each day and every day of such violation, to be recovered in any court of competent jurisdiction in the county in which the violation occurs, such suit to be by the direction of the Railroad Commission and directly in the name of the State of Texas by the Attorney General of the State, or by the County or District Attorney in the County in which the violation occurs.

VIII

Said Act further provided for the granting of injunctions to restrain the violation of such rules, regulations or orders,

and gave the Commission power to inquire into the production, storage and transportation of oil and natural gas to determine whether or not "waste" existed, and to require the making and filing of sworn statements pertaining to such production, storage and transportation, and inspection of the gauges of the wells, books and records of any party so engaged, and further required the keeping of permanent records or copies thereof, with the quantity and amount of [fol. 14] all such oil and/or gas produced, stored and transported, with the right to the Railroad Commission and Attorney General to inspect such records as often and at such times as they may deem necessary, and provided that the failure to keep such records should be grounds for forfeiture of the charter rights and privileges and dissolution of the corporate existence, and, further, grounds for enjoining foreign corporations from transacting business within this state.

IX

Said Act further gave the Railroad Commission the right, upon verified complaint, to hold such hearings at such times and places as it might fix, to determine whether or not such waste existed or was reasonably imminent, and to make inquiry what rule, if any, or regulation or order should be made to correct, prevent or lessen the same. Such Act required notice of such hearings, gave all parties the right to he heard and introduce evidence, to process for witnesses and the production of evidence, and gave power and authority, if the Commission finds such waste exists or is reasonably imminent, to make and enter such rule, regulation and order "as in its judgment the facts justify in order to correct, prevent or lessen such waste, if any."

X

It empowered the Commission, if in its judgment any reduction or adjustment in the production of oil or gas from any well or pool was necessary to prevent, to determine how to accomplish such reduction or adjustment, and to [fol. 15] distribute, prorate or otherwise apportion such reduction or adjustment among the wells committing such waste or contributing thereto as the facts justly and equitably might require, and require all parties affected thereby to comply with such orders.

XI

Said Act further provided that from time to time "after notice and hearing," the Commission might amend, revoke, suspend, renew or extend any such rule or order, to such an extent and under such circumstances as might be justly and equitably necessary.

XII

By Article 6092 of said Act, the Commission was required to make and enforce rules and regulations for the conservation of oil and gas:

(1) To prevent the physical waste as hereinbefore defined, of oil and gas in drilling and producing operations and in the storage, piping and distribution thereof.

(2) To require dry or abandoned wells to be plugged in such way as to confine oil, gas and water in the strata in which they are found and to prevent them from escaping into other strata.

(3) For the drilling of wells and preserving a record thereof.

(4) To require such wells to be drilled in such manner as to prevent injury to adjoining property.

(5) To prevent oil and gas and water from escaping from the strata in which they are found into other strata.

[fol. 16] (6) To establish rules and regulations for shooting wells and for separating oil from gas.

(7) To require records to be kept and reports made by oil and gas drillers, operators and pipe line companies and by its inspectors.

(8) To do all things necessary to prevent physical waste of oil and gas as hereinbefore defined, whether herein enumerated or not, and shall establish such rules and regulations as will be necessary to carry into effect this law and to conserve the oil and gas of this State by preventing physical waste as herein defined.

XIII

By Article 6032 a tax was levied of one-tenth of one cent per barrel of forty-two standard gallons of crude petroleum, to be collected in the same manner as the gross

receipts tax on such petroleum; and the Commission was empowered to appoint supervisors, deputy supervisors and umpires necessary to carry out the provision of said Act.

XIV

Your Complainants represent that they have already drilled wells capable of producing oil and gas to the extent as hereinatfer set out on the tracts hereinbefore described and numbered "Tract No. 1," "Tract No. 2," "Tract No. 3," "Tract No. 4," and "Tract No. 5," and that they are ready, able and willing to drill additional wells on all of the tracts hereinbefore mentioned; but by reason of the facts and circumstances hereinafter set out, have prior to [fol. 17] this time been compelled to delay the drilling of same; that all of such wells so drilled have been drilled in a workmanlike manner, properly cemented and cased, and drilled to a depth at which the bottom of the hole is in each instance in excess of twenty-five feet above the existing water level underlying the oil bearing strata; that none of said holes are drilled on the western portion of the East Texas Oil Field; that none of said wells have ever produced water in any quantity; that each and all of said wells are capable of producing, without any water, a total of 5,000 barrels of oil per day; that none of said wells require an abnormal and excessive quantity of gas for the lifting of such quantity of oil as hereinbefore set out; that all of said wells have been, and will in the future continue to be, operated in an approved and satisfactory manner; that none of the production from said wells have been or will in the future be permitted to evaporate or be destroyed; that your Complainants have a market for the entire production thereof, and can and will transport same immediately; that the gas emitted therefrom and used in lifting the oil therein can be and will be "trapped," and can and will be processed so as to eliminate whatever gasoline there may be left in same and the residue of gas can be and will be utilized in the production of fuel for pumping and transporting oil and in the process of refining same.

XV

That on or about September 2, 1931, in purported pursuance of said Act of said 42nd Legislature, First Called

Session, the Railroad Commission of Texas issued and promulgated an order requiring these Plaintiffs and all others similarly situated to limit the production of oil from each [fol. 18] of the wells upon the properties hereinbefore described to a total of 225 barrels per day, and subsequently, on September 18, 1931, so amended said order, without a hearing or an opportunity to be heard and without notice to these plaintiffs or others interested therein, and by said order required these plaintiffs and others to limit the production of each of the before mentioned wells to the amount of 185 barrels of oil per day, and have since said day and dates, commanded, required and demanded of these plaintiffs and others, under pains and threats of the penalties so provided in said Act, compliance with said orders, and have by threats and by use of armed persons forced these plaintiffs to so limit their production to the amounts as set out in said purported order, and of the so-called "Amended Order"; and unless the relief herein prayed is granted, will continue so to force compliance with said purported orders. That by reason of such act and conduct, and because of the inability of your complainants to resist the same, the property and/or liberty of these plaintiffs has been irreparably damaged and destroyed, for which said damage and destruction there is no adequate, or at best grossly inadequate, remedy at law.

XVI

In purported pursuance of said Act the Railroad Commission did, on September 2, 1931, adopt and promulgate an order for the so-called East Texas Oil Field (which designation includes properties of the plaintiffs hereinbefore described) and among other provisions of said order, the plaintiffs (and all others owning properties in the so-called East Texas Oil Field) were ordered and required [fol. 19] to limit the output of oil from each well so owned and operated by themselves to an amount not in excess of 225 barrels of oil per day. That such order of the Commission took no account of the location of each well or wells on the so-called oil bearing structure in said field, nor of the manner of method of drilling the same, nor of the depth to which they might be drilled, nor of the liability to produce water, or to infuse such water into the

oil bearing strata, nor any other facts or factors in said particular field, but that said order arbitrarily, capriciously and unjustly required these plaintiffs to so limit the output of oil from the wells owned by themselves, and that said order, in direct violation of the statutes under which it purportedly was issued and in contravention of the Constitution of the State of Texas and of the United States, was based solely upon a desire by said Railroad Commission and in pursuance of a scheme and plan long since evolved and continuously followed, to limit the production of said East Texas Oil Field to a maximum of 400,000 barrels of oil per day from all wells, in order to prevent, if possible, an overproduction of oil from said field and an adverse effect upon the market price of the products thereby produced, and said order had no relation in fact or in theory with any bona fide attempt to prevent actual physical waste of oil in that location, but was only directed at such so-called economic waste.

XVII

Your plaintiffs aver that each and all of the wells drilled and already completed on said properties are capable of producing oil from the hereinbefore described premises [fol. 20] to the extent of at least 5,000 barrels of pure oil per day for each well, and that at the location of new wells on said properties, which the plaintiffs hope and expect to drill, such new wells will be capable of producing said amount of pure oil; that all of said wells so drilled have been drilled in a workmanlike manner to a depth, safely and surely, above the water level underlying the oil bearing strata in said field, and that all of said wells are upon locations and to such depths as to permit the same to flow and produce the amount of 5,000 barrels and in no way injure the oil bearing subsurface strata, nor permit the influx of water into same, either by "coning" or otherwise; that there are or may be wells in said field on the western edge of the same which are drilled into the thin strata of oil bearing sand, and in which to permit any such flow as 5,000 barrels per day would undoubtedly infuse water into the oil bearing strata, and in addition there are other wells in said field which by reason of having been drilled too deeply, have penetrated the oil bearing strata

and into the water underlying same, which said wells might and could possibly by "coning" or otherwise, infuse water into the oil bearing strata; but that the wells on your plaintiffs' property are treated the same and are limited to the same output as the hereinbefore described edge wells or faultily drilled wells, and that such treatment by the Commission and the inclusion of your plaintiffs' wells in said order, without exception, is arbitrary, capricious and unjust. That the wells which have already been drilled by your plaintiffs can and will be operated in a good workmanlike manner, and that to permit the same to produce a [fol. 21] maximum of 5,000 barrels per day cannot in any way damage or injure the properties upon which they are drilled, the adjoining properties thereto, or any other property in the so-called East Texas Oil Field.

XVIII

Subsequently, and on September 18, 1931, without a hearing or an opportunity given to these plaintiffs to be heard, said Railroad Commission issued and promulgated a so-called amendment to said order of September 2, 1931, by the terms of which so-called Amendment the production of all wells, without distinction as to their location, depth, etc., in the so-called East Texas Oil Field, including the wells on the property of your plaintiffs, was limited to a maximum of 185 barrels per day, and in addition, by said amendment, it was attempted to limit the gas oil ratio to 500 cubic feet of gas per barrel of oil, or in other words, to permit the production of no more than 185 barrels per day, and 92,500 cubic feet of gas for the lifting thereof.

XIX

In this connection your plaintiffs aver that almost each and every well in the so-called East Texas Oil Field has a variable gas oil ratio, that there is no fixed ratio in said field for the production of oil therefrom by the lifting power of gas. That in some instances ratios thereof vary in adjoining wells from a production of 65 barrels per hour through a 11/16th choke with a ratio of 45 cubic feet to one barrel of oil, to a production of 80 barrels per hour [fol. 22] through a 11/16th choke, to a ratio of 436 cubic feet of gas to one barrel of oil. That it is and has been

for a long time past the generally accepted and common practice to permit the lifting of oil by the subsurface gas pressure; that to do so permits the operation of a well and the production of oil therefrom at greatly decreased costs, and that the use of such gas in such manner constitutes an economic use thereof, and not a waste of same.

XX

And in this connection, your plaintiffs are informed and believe, and therefore aver that 5,000 barrels of oil could be produced per day from each and every well on the hereinabove described premises without exceeding the gas oil ratio of 500 cubic feet of gas to one barrel of oil, but that if same be not correct, then the reduction by the Commission for the production of gas in the relation of 500 cubic feet of gas to one barrel of oil was also based upon the desire and intent of said Commission long since evolved and continued to date to so limit or attempt to limit the production of oil so as not to exceed the total sum of 400,000 barrels for the East Texas Field, and that such order concerning such gas oil ratio is not an attempt to prevent a physical waste of gas, but solely, only and purposely an attempt to effect a decrease in the production of oil in order to affect the market price thereof.

XXI

In this connection, further, your plaintiffs allege and show that they are ready, willing and able to and will, if so permitted, trap all the gas emitted from the well or wells [fol. 23] on the hereinbefore described property as the same comes from each of said wells, and will use the same in the production of fuel for pumping, heating, lighting and for refining the crude oil, if, as and when the same is permitted to be produced, and that no part of such gas will be permitted to escape in the open air.

XXII

Further, your plaintiffs allege that such gas oil ratio was without regard to the location of the wells in the so-called East Texas Oil Field, nor to their depth, potential production, manner of operation, nor even to the possible use to be made of such gas; but that, on the contrary, such

oil gas ratio was fixed arbitrarily, capriciously, and was unjust to these plaintiffs.

XXIII

Further, plaintiffs allege that the total production of the so-called East Texas Oil Field now exceeds a total of 400,000 barrels per day, and they are informed and believe, and therefore allege that the Railroad Commission has, on October 10, 1931, without notice or an opportunity for these plaintiffs to be heard, issued another so-called amendment to the orders of September 2nd and September 18th, by the terms of which the limit of production of each well of both the oil and gas will be further reduced, without regard to the location of each well, the depth thereof, nor the use and saving of the gas therefrom; and that unless the relief herein prayed be granted, will enforce the same.

[fol. 24]

XXIV

Your plaintiffs allege that by reason of the terms of the Act of the 42nd Legislature, known as Chapter 26, House Bill 25, providing penalty in addition to the pains for contempt of such orders of said Railroad Commission, in an amount of not more than $1,000.00 for each day of such so-called violation, such penalty to be recovered by suits therefor instituted by the Attorney General of Texas and/or by the County Attorney of Rusk County, they have heretofore been intimidated into the complaining of such course as heretofore set out, and that a failure or refusal to further comply therewith will bring upon themselves expensive and vexatious suits for the collection of the so-called penalties, unless the relief herein prayed for be granted.

XXV

Plaintiffs further allege that the respondent, Honorable Jake Wolters, is a military officer in command of certain military subordinates, too numerous to be mentioned herein, and that contrary to the Constitution of the State of Texas and of the United States, the said Wolters and his military subordinates are commanding, requiring and compelling these plaintiffs, upon pain of arrest, imprisonment and fine, to limit the production of wells on the hereinbefore described property, to the amounts set out in the

so-called purported orders of the Railroad Commission, and that such acts and conduct constitutes the taking of property without just compensation and without due process of law, contrary to the Constitution of the State of [fol. 25] Texas and of the United States. That the said Wolters is commanding, ordering, requiring and compelling these plaintiffs to make daily detailed reports to himself of the production from each well from the operation of said properties, and that to enable these plaintiffs to comply with the same is costing a considerable sum of expense; and that under the orders heretofore issued and set out, there is no lawful right on the part of said Wolters to require the same.

XXVI

Your plaintiffs allege that the oil produced since September 2, 1931, has a market value of 68 cents per barrel, and that the properties hereinbefore mentioned and described have a value for each property in excess of $200,000.00, and are easily capable of producing an income from each of $50,000.00 per month, but by reason of the acts of respondents the income from said properties is reduced to $3,000.00 per month, and that after paying operating expenses and overhead expenses, the loss of income to each plaintiff herein amounts to in excess of $45,00-.00 per month, and for each and every day the acts and conduct herein complained of is continued, will and does cause to these plaintiffs a loss of $1500.00 for each day thereof.

XXVII

That your plaintiffs have already since September 2nd, 1931, suffered a loss of income to the extent of $45,000.00, and will, unless the relief herein prayed is granted, suffer an additional loss of $1500.00 for each day of such continuation.

XXVIII

That your plaintiffs are informed and believe, and there- [fol. 26] fore allege, that the respondents in this cause are without sufficient funds or properties to pay a judgment

for said damages, if, as and when the same may be recovered; and, accordingly, if said acts and conduct may be continued, your plaintiffs will be without an adequate, or at best, a most inadequate remedy at law.

XXIX

That if your plaintiffs are compelled to further reduce the production of each of the wells upon the properties hereinbefore mentioned (as it is alleged is and will be the case) such acts and conduct will further increase the damage suffered by each of them to a considerable extent, and that unless the relief herein prayed is granted, such additional damages will be impossible of recovery from these defendants, and your plaintiffs will suffer immediate and irreparable loss and damage, for which there is no adequate remedy at law.

Wherefore your plainffs pray that this Honorable Court issue its most gracious temporary restraining order, commanding and requiring these defendants, their officers, agents, servants, or parties in privity with them, to desist and refrain from in any manner interfering with these plaintiffs or their agents and servants, or from in any manner or method interfering with these plaintiffs, their agents and servants, in the production of oil and/or operation of their wells on the property hereinbefore described, and from seeking or attempting to seek to impose penalties or fines therefor, or to imprison or detain these plaintiffs, their agents or servants, by reason of such action. [fol. 27] That this Honorable Court issue its order commanding and requiring these defendants, within ten days hereof, to be and appear before this Court and show cause why they and their officers, agents, servants, employes and parties in privity with them should not be temporarily restrained and enjoined, pending the further orders of this Court, from in any manner or method interfering with these plaintiffs in the production of oil and/or operation of their wells from and on the property described in this bill of complaint, and from seeking or attempting to seek to impose penalties and fines therefor, or to imprison and detain these plaintiffs, their agents or servants, by reason of such production and/or operation.

That these defendants be cited to appear and answer according to law hereunto, that upon final hearing, such temporary restraining order be made permanent; that these plaintiffs have decree for their damages of $45,000.00, for costs of suit and for such other and further relief to which they may show themselves justly entitled.

(Signed) Bailey, Nickels & Bailey, Jos. W. Bailey, Jr., Solicitors for the Plaintiffs.

Duly sworn to by Jos. W. Bailey, Jr. Jurat omitted in printing.

[fol. 28] [File endorsement omitted.]

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

FIRST AMENDED ORIGINAL PETITION AND BILL OF COMPLAINT —Filed November 20, 1931

To said Honorable Court:

Leave of the Court having first been had and obtained, without prejudice or effect or waiver or dissolution of the temporary restraining order heretofore issued in this cause, or without prejudice or effect or dismissal of the proceedings in contempt now pending in this cause, Plaintiffs, E. Constantin, Brock-Lee Oil Company, a corporation, and J. D. Wrather, come now and in the above styled and numbered cause, file and present this their first amended original petition and bill of complaint against each and all of the persons named as defendants hereinbelow (and complaining also of all other persons in anywise representing or acting under orders or instigation of or with any of such named defendants, and of all other persons with notice), and for such cause of action show unto the Court the matters and things hereinafter stated.

[fol. 30] I

The plaintiffs, E. Constantin and J. D. Wrather, are citizens of the State of Texas, and the Brock-Lee Oil Company

is a corporation organized under and by virtue of the laws of the State of Delaware, with a permit to do business in the State of Texas, and of whom T. B. Cochran is the President and Managing Officer.

The defendant Lon Smith is a resident of Henderson, Rusk County, Texas, within the Eastern District of Texas, Tyler Division.

The defendant C. V. Terrell is a resident of Austin, Travis Connty, Texas.

The defendant Pat M. Neff is a resident of Waco, McLennan County, Texas, and temporarily to be found in Austin, Travis County, Texas.

All of the three above named defendants constitute and are the duly qualified and acting Railroad Commissioners of the State of Texas.

The defendant James V. Allred is the Attorney General of the State of Texas, and resides in Austin, Texas.

The defendant Jacob F. Wolters is a resident of Texas, and may be found at Kilgore, Rusk County, Texas.

The defendant V. McDavid is County Attorney of Rusk County, Texas, and resides at the county seat thereof, Henderson, Texas.

The defendant Ross S. Sterling is Governor of the State of Texas, and resides at Austin, Texas.

[fol. 31] The defendant W. W. Sterling is Adjutant General of the State of Texas and resides at Austin, Texas.

And for cause of action, plaintiffs respectfully allege:

II

That this action (and same as between each plaintiff and defendants) involves more than the sum of $3,000.00 exclusive of interest and costs, and the solutions of the questions presented require the interpretation, construction and enforcement of the Constitution of the United States and the laws made in pursuance thereof, and protection and enforcement of rights and privileges of plaintiffs given and secured by the Constitution of the United States, as is hereinafter more fully shown, claimed and prayed.

III

Heretofore, during and prior to the year of 1867, all of the lands described hereinbelow were owned (in fee simple)

by the State of Texas, and during and shortly after such time the State of Texas, by its lawful authorities, for a good and valuable consideration, did obligate itself by contract to convey and grant, and did for a good and valuable consideration, convey and grant such lands (in fee simple estate) and the right to use and enjoy such lands and constituents (including minerals) thereof, unto a person or persons, their heirs, assigns and legal representatives. And thereafter, during the year 1869, and again during the year 1876, the State of Texas by consti- [fol. 32] tutional provisions then adopted, expressly relinquished unto such owners (and their assigns) any and all claims (if any the State of Texas had) to any right, title or interest in, to and against and with respect to any and all minerals in and under or what might be produced from such lands. By said contract and obligation and constitutional acts the ownership of said land, including the minerals thereof, was fully and completely divested out of the State of Texas and vested in said person or persons and their heirs, assigns and legal representatives to whom same was granted by the State of Texas as aforesaid.

Plaintiffs (under and by good and sufficient chain of title and by good title) now hold and own (in whole or substantial part) oil and/or gas in or under said lands with right to use such lands for production, using and marketing therefrom oil and/or gas that may be therein or thereunder or producible therefrom,—such oil and/or gas and right to produce, use and market same and right to use of said lands having been contracted to be sold and granted, and sold and granted, for good, sufficient consideration by the State of Texas, as aforesaid, to those persons whose rights and estate, as aforesaid, plaintiffs now own and hold. Plaintiffs so own and hold such minerals and mineral estates and rights appurtenant thereunto, as aforesaid, in and with respect to the lands next described by "tracts" in amounts and proportions as next shown.

Tract No. 1

E. Constantin owns and claims an undivided one-half part of and interest in the oil and gas and/or mineral [fol. 33] leasehold in the following described tract of land in Rusk County, Texas:

Beginning at the northwest corner of 56.5 acre tract in the F. Cordova League, described in lease given by W. P. Brett and wife M. A. Brett, to C. M. Joiner, Trustee, dated March 29, 1927, recorded in Volume 132, pages 173-4, of the Deed Records of Rusk County, Texas; Thence south 103 varas; thence east to a point in public road which is the east line of said 56.5 acre tract; thence in a northerly direction with said road to a point where said road crosses the north line of said 56.5 acre tract; thence west with said north line 555 varas to the place of beginning, containing 10 acres.

Tract No. 2

E. Constantin also owns and claims an undivided one-half part of and interest in the oil and gas and/or mineral leasehold in the following described land out of the Juan Ximines Survey, in Rusk County, Texas:

The northwest 10 acres of the east 40 acres of that certain 121.6 acre tract known as the A. J. Deason Farm, and being the same northwest 10 acres described in that certain assignment of oil and gas lease executed by E. G. Mannan to W. P. Luse, dated October 13, 1930, and shown of record in Volume 156, page 389, of the Deed Records of Rusk County, Texas; and a strip of land 60 feet in width across the entire north end of the southwest 10 acres of the east [fol. 34] 40 acres of the said 121.6 acre tract, containing in all 11 acres of land, more or less.

Tract No. 3

J. D. Wrather owns and claims a seven-eighths part of and interest in the oil and gas and/or lineral leasehold in and to the 10 acres of the east 25 acres of the following described 50 acre tract of land in Rusk County, Texas:

Being 50 acres of land, more or less, a part of the Francisco Cordova League; beginning at the northwest corner, a stake, a pine S. 15½, 19 lengths; thence south 18-44/100 chains, a stake Black Jack 72-¾ west 8 lengths; thence to the London and Overton Road; thence northwest with the London and Overton public road to the N.B. Line of the tract of land sold to G. W. Eaton by the Estes heirs; thence west to the place of beginning, and containing 50 acres of land, more or less, of the west portion of the M. Estes

homestead, fully described in a deed from C. A. Walker and wife to J. D. Cones, as appears of record in Volume 121, page 399, of the Deed Records of Rusk County, Texas.

Tract No. 4

Brock-Lee Oil Company owns and claims a seven-eight-s part of and interest in the oil and gas and/or mineral leasehold in the following described tract of land located in Rusk County, Texas:

[fol. 35] Being the south 11.1948 acres of the north 26.0284 acres of the following described lease: Being a part of the Robt. W. Smith Survey, and being known as the old Brock Farm, located about four miles northeast of Overton, and described by metes and bounds as follows:

Beginning at the northwest corner of a 4½ acre Survey for Andy Givens from a stake from which a dogwood 4 in. brs. W. 762 vrs, an iron wood 3 in. dia. brs. 3.60 E. 3 vrs; thence N. 966 vrs. to a stake from which a white oak 6 in. dia. brs. 3.80 E. 5/10 vrs; thence E. 344 vrs. to a corner; Thence south 966 vrs to a corner. Thence W. to beginning, making 59.92 acres, more or less.

Tract No. 5

Brock-Lee Oil Company owns and claims a seven-eighths part of and interest in the oil and gas and/or mineral leasehold in Rusk County, Texas, in the following described tract:

Being a part of the George Berry Survey in Rusk County, Texas, more particularly described as being 50 acres of land, more or less, of the George Berry Head-right of 100 acres:

Beginning half way of the E. and W. line of that 100 acre Survey stake from which a sweet gum 13 in. brs. S. 69 W. 8-5/10 vrs. a hickory 9 in. brs. south 60 west 6-5/10 vrs; thence S. 666½ vrs. stake from which Hick 8 brs. N. [fol. 36] 50 E. 3 vrs; Post Oak 11" brs. S. 70 W. 6 vrs; thence E. 419-¾ vrs. stake from which Blk. Jk. 10 brs. S. 60-66 vrs, Sweet Gum 3 brs. S. 25 W. 2 vrs; thence N. 666½ vrs. to stake from which a red oak 20 in. brs. E. 3 vrs, another 14 in. brs. W. 4 vrs; thence W. 419¾ vrs. to place of beginning.

As a part of their rights and estates (deraigned as aforesaid) plaintiffs now have (and for a long time past have had) the right to do any and all acts and things upon, in and with respect to said lands and minerals therein as may be necessary or proper or needed in or in connection with the production, use and marketing of oil or gas therefrom.

IV

Plaintiffs represent that they have already drilled wells capable of producing oil and gas to the extent as hereinafter set out on the tracts hereinbefore described and numbered "Tract No. 1," "Tract No. 2," "Tract No. 3," "Tract No. 4," and "Tract No. 5," and that they are ready, able and willing to drill additional wells on all of the tracts hereinbefore mentioned; but by reason of the facts and circumstances hereinafter set out, have prior to this time been compelled to delay the drilling of same; that all of such wells so drilled have been drilled in a proper and workmanlike manner, properly cemented and cased, and drilled to a depth at which the bottom of the hole in each instance is in excess of twenty-five feet above the existing water level underlying the oil bearing strata; that none of said holes are drilled on the Western portion of [fol. 37] the East Texas Oil Field; that none of said wells have ever produced water in any quantity; that each and all of said wells are capable of producing, without any water, a total of 5,000 barrels of oil per day; that none of said wells required an abnormal and excessive quantity of gas for the lifting of such quantity of oil as hereinbefore set out; that all of said wells have been, and will in the future continue to be operated in a proper, approved and satisfactory manner; that none of the production from said wells has been or will in the future be permitted to evaporate or be destroyed; that your complainants have available use or market for all such oil or gas as may be producible thereby or therefrom, and can and will transport, use or market same immediately upon its production; that the gas emitted therefrom and used in lifting the oil therein can be and will be properly "trapped," and can and will be properly processed so as to eliminate whatever gasoline there may be left in same, and the residue of gas can be and will be utilized in the proper production of fuel for

pumping and transporting oil and in the process of refining same.

V

Your complainants aver that each and all of the wells drilled and already completed on said properties are capable of producing oil from the hereinbefore described premises to the extent of at least 5,000 barrels of crude oil per day for each well, and that at the location of new wells on said properties, which the complainants hope and expect to drill, such new wells will be capable of producing said amount of pure oil; that all of said wells so drilled [fol. 38] have been drilled in a workmanlike manner to a depth, safely and surely, above the water level underlying the oil bearing strata in said field, and that all of said wells are upon locations and to such depths as to permit the same to flow and produce the amount of 5,000 barrels and in no way injure the oil bearing sub-surface strata, nor permit the influx of water into same, either by "coning" or otherwise; and that there are or may be wells in said field on the western edge of the same which are drilled into the thick strata of oil bearing sand, and in which to permit any such flow as 5,000 barrels per day would undoubtedly infuse water into the oil bearing strata, and in addition there are other wells in said field which by reason of having been drilled too deeply, have penetrated the oil bearing strata and into the water underlying same, which said wells might and could possibly by "coning" or otherwise, infuse water into the oil bearing strata; but that the wells on your complainants' property are treated the same and are limited to the same output as the hereinbefore described edge wells or faultily drilled wells, and that such treatment by the Commission and the inclusion of your complainants' wells in the hereinafter described orders, without exception, is arbitrary, capricious and unjust. That the wells which have already been drilled by your complainants can and will be operated in a good workmanlike manner, and that to permit the same to produce a maximum of 5,000 barrels per day cannot in any way damage or injure the properties upon which they are drilled, the adjoining properties thereto, or any other property in the so-called East Texas [fol. 39] Oil Field.

VI

And in this connection, complainants are informed and believe and therefore aver that 5,000 barrels of oil can be properly produced per day from each and every well on the hereinbefore described premises without exceeding the gas oil ratio of 500 cubic feet of gas to one barrel of oil, but that if same be not correct, then the attempted or ordered reduction by the Commission for the production of gas in the relation of 500 cubic feet of gas to one barrel of oil was also based upon the desire and intent of the defendants (especially defendants Neff, Terrell and Smith, Railroad Commissioners) long since evolved and continued to date to so limit or attempt to limit the production of oil so as not to exceed the total sum of 400,000 barrels for the East Texas Field, and that such order concerning such oil gas ratio is not an attempt to prevent a physical waste of gas, but solely, only and purposely an attempt to effect a decrease in the production of oil in order to affect the market price thereof.

VII

In this connection, further, complainants allege and show that they are ready, willing and able to and will, if so permitted, trap and otherwise properly handle and use all the gas emitted from the well or wells on the hereinbefore described property as the same comes from each of said wells, and will use the same in the production of fuel for pumping, heating, lighting and for refining the crude oil, if, [fol. 40] as and when the same is permitted to be produced, and that no part of such gas will be permitted to escape in the open air.

VIII

Further, your complainants allege that the oil produced since September 2, 1931, has a market value of $0.68 per barrel, and that produced since November 4th, 1931, has a value of $0.83 per barrel, and that the properties hereinbefore mentioned and described have a value for each property in excess of $200,000.00, and are easily capable of producing an income from each of $50,000.00 per month, but by reason of the acts of defendants the income from said properties is reduced to $3,000.00 or less per month, and

that after paying operating expenses and overhead expenses, the loss of income and damage to each plaintiff herein amounts to in excess of $45,000.00 per month, and for each and every day the acts and conduct herein complained of is continued, will and does cause to these plaintiffs each a loss of $1500.00 for each day thereof.

Your plaintiffs each have already since September 2, 1931, suffered a loss of income and damage to the extent of $100,000.00, and will, unless the relief herein prayed is granted, suffer an additional loss of $1500.00 for each day of such continuation.

Your complainants are informed and believe, and therefore allege, that the respondents in this cause are without total sufficient funds or properties to pay a judgment for said damages, if, as and when the same may be recovered; [fol. 41] and, accordingly, if said acts and conduct may be continued, your complainants will be without an adequate, or, at best, a most inadequate remedy at law.

If complainants are compelled to further reduce the production of each of the wells upon the properties hereinbefore mentioned (as it is alleged is and will be the case) such acts and conduct will further increase the damage suffered by each of them to a considerable extent, and that unless the relief herein prayed is granted, such additional damages will be impossible of recovery from these defendants, and your complainants will suffer immediate and irreparable loss and damage, for which there is no adequate remedy at law or otherwise save that herein prayed.

IX

Your complainants allege that in the early part of the year 1931 and for some considerable time theretofore there existed in the United States, and in fact in many countries of the world, a serious disturbance and depression in the financial and business world, and that among those engaged in the business of producing crude oil and in the transportation, refining and sale of derivatives thereof, there was a situation in and under which many of the persons and corporations in said business in the United States, and particularly in the Southwestern States and in Texas, were suffering serious losses of income, by reason of the fact that the total crude oil imported and domestically produced

greatly exceeded the average sale and consumption thereof, thereby causing continued and drastic reductions in the price received upon the sale of such crude oil and deriva- [fol. 42] tives refined therefrom.

X

Under these conditions and on or before the first of January, 1931, there was formed an agreement, combination and conspiracy among various persons engaged in the oil business throughout the United States and in Texas and other Southwestern oil producing states, the purpose and effect of which was to restrict the production of crude oil to such an extent as that such output or production, together with the importations thereof from foreign countries into the United States, should be less than the total market demand for such crude oil and its derivatives, and thus directly and/or indirectly to affect the market and/or sales price of crude oil by upward revisions thereof, and thus and thereby violating the anti-trust laws of the State of Texas and of the United States, and compelling the consuming public of the United States and of Texas to pay an increased price for such crude oil and/or the derivatives refined therefrom.

XI

That the members of this combination and conspiracy who entered into this agreement thus in restraint of trade and in violation of the law are too numerous to mention and are unnecessary parties to this bill; but your complainants are informed and believe and therefore respectfully allege that fact to be that among those concerned, entering into and remaining in such combination, conspiracy and agreement, was the Humble Oil and Refining Company, a corporation, in the business of producing and transporting [fol. 43] crude oil and refining and selling the derivatives therefrom in Texas, which said company is owned in whole or in substantial part, and at least to the extent of control thereof, by the Standard Oil Company of New Jersey, and further that the Texas Company, a corporation engaged in the production and transportation of crude oil and the refining and sale of derivatives therefrom in the State of Texas, was and is a member of such combination,

conspiracy and agreement, together with many other oil companies and individuals.

XII

In this connection your complainants are informed and believe and therefore allege that fact to be that the respondent herein, Hon. Ross S. Sterling, was for many years financially interested as a large stockholder, director and officer of the Humble Oil and Refining Company; that the brother of the respondent, Hon. Ross S. Sterling, is at present an executive Vice-President of said company, and that said respondent Hon. Ross S. Sterling borrowed from and at present owes the said Humble Oil and Refining Company a sum or sums of money in excess of $400,000.00 and less than $1,000,000.00, the exact details and amounts of which are unknown to these complainants but well known to the respondent Hon. Ross S. Sterling; and, further, that the respondent Hon. Jacob F. Wolters is an attorney in the regular employ of the said Texas Company, and that the relations of the said respondents, Hon. Ross S. Sterling and Hon. Jacob F. Wolters, with said two corporations is so close and intimate as to disqualify them from action and judgment in the premises.

[fol. 44]

XIII

That in order to carry out such combination, conspiracy and agreement the said individual members thereof agreed to and did combine together for the purpose of restricting the production of crude oil in Texas and elsewhere, and of attempting to compel parties not entering into said agreement, nor even at said time cognizant thereof, to limit and restrict the output of crude petroleum within the State of Texas, Oklahoma and Kansas to a total amount within and less than the estimated market demand therefor, for the purpose hereinbefore set out; that said conspirators also evolved a plan and combined together for the purpose and with the intent of obtaining, under color of a lawful means, a system and scheme of so-called "Proration," wherein and whereby producers of crude petroleum, particularly within the State of Texas, should be compelled under color of a law, but in truth and in fact, unlawfully, arbitrarily, capriciously and unjustly to themselves, to restrict the out-

put of crude petroleum to such a point as might be safely within the market demand, and thereby and therefore affect the price to be received in the sale thereof.

XIV

That in furtherance of said combination, conspiracy and agreement, the said parties assisted in the organization of what was known as the "Central Proration Committee" and the "East Texas Proration Committee" and other similar committees and other bodies, and particularly the "East Texas Oil Conservation Association," and purportedly attempting to proceed under a law apparently authorizing the Railroad Commission of Texas to conserve the [fol. 45] natural resources of said state, joined together to defray the expenses of such committees in the preparation of purported theories of conservation by "proration," and while acting openly, notoriously and admittedly in an advisory capacity to said commissions, obtained the issuance of an order in April 1931 and again in June 1931 by the said Railroad Commission of Texas, wherein and whereby producers in the so-called East Texas Oil Fields, comprising the counties of Rusk, Gregg, Smith and Upshur were compelled to so reduce the output of each and every well in said area as to limit the production thereof to approximately 500 barrels per day. That said order and the enforcement thereof was unlawful, arbitrary, capricious and unjust to these complainants by reason of the fact that it was palpably and plainly entered and attempted to be enforced solely for the purpose of preventing a glut upon the market by the overproduction of crude oil in said area, and was without any reasonable, practical relation or effect, and was not for the purpose nor with the intent of the accomplishment of conservation of the natural resources of the state or of said area, and such order and its enforcement constituted a taking of private property without due process of law or without just compensation, contrary to the Constitution of the United States.

XV

That upon application therefor the United States District Court for the Western District of Texas, being constituted, as provided by the statute, of three judges, in the

case styled McMillan et al. vs. Railroad Commission of [fol. 46] Texas et al., decreed and declared said orders of the Railroad Commission void and of no effect and contrary to the Constitution of the United States of America.

XVI

That thereupon and thereafter the Legislature of the State of Texas met, pursuant to the call of the Governor, in the First Called Session of the 42nd Legislature, and on August 12, 1931, said Legislature of the State of Texas approved and passed a law known as House Bill No. 25 relating to powers and duties of the Railroad Commission of Texas in respect to conservation of oil and gas, and said Act was approved and became effective of the 12th day of August, 1931. That said Act and the actions of these respondents in purported compliance thereunto are wholly void and of no force and effect and contrary to the Constitution of the State of Texas and of the United States, in that:

(a) Said Act is vague, indefinite, ambiguous and uncertain, and for those reasons the same is unconstitutional, void, and contrary to the Constitution of the State of Texas, and in violation of the Fourteenth Amendment to the Constitution of the United States, and has operated and will operate to deprive complainants of their property without due process of law or without compensation.

(b) Said Act and the acts of the respondents in purported compliance therewith were and are repugnant to Art. 1, Sec. 10, of the United States Constitution, because the same constituted or caused an impairment of the obligation of contracts.

[fol. 47] (c) Said Act and the acts of the respondents in purported compliance therewith were and are repugnant to Sec. 1, of the Fourteenth Amendment of the Constitution of the United States, prohibiting the State of Texas from depriving any person of liberty and/or property without due process of law, denying to any person within its jurisdiction equal protection of the law.

(d) Such acts and pretenses as will be more fully hereinafter set out amount to the taking or damaging of property

for a public use without compensation, contrary to the Fourteenth Amendment to the Constitution of the United States and the laws made in pursuance thereof.

(e) Said Act and the acts of the respondents in purported compliance therewith, and the threatened acts and pretenses, all of which will be hereinafter set out, are contrary to the Constitution of the United States, in that same are arbitrary, capricious and unjust to these plaintiffs, and contrary to the Fourteenth Amendment of the Constitution of the United States.

(f) Said Act attempts to place upon these complainants such a burden in the way of penalties and bonds as to attempt to prevent and deter them from asserting a cause of action, and thereby results in a denial of the due process of law and the equal protection of the law.

XVII

That thereafter, and when the production of crude oil in the State of Texas again greatly exceeded the demand therefor, because of which fact the price received and paid for such crude oil had gone down to approximately ten cents per barrel in the East Texas Field, on the 16th day of August, 1931, the respondent Hon. Ross S. Sterling, purportedly acting in his capacity as Governor of the State [fol. 48] of Texas, but in truth and in fact far exceeding the authority given to the holder of said office under the terms and provisions of the Constitution of the State of Texas and the United States of America and the statutes made in pursuance thereof, issued and promulgated a purported Proclamation No. 8447, wherein and whereby the said respondent Hon. Ross S. Sterling declared that there existed "an organized and entrenched group of crude petroleum oil and natural gas producers" in the East Texas Oil Field, covering the counties of Upshur, Rusk, Gregg and Smith, and that such organized and entrenched group were "in a state of insurrection" against the conservation laws of the state relating to the prebention of waste of crude petroleum oil and natural gas and in open rebellion against the constituted civil authorities of this state to enforce such laws. Said proclamation further recited that this condition had caused threats of violence on

the part of indignant responsible citizens against those who openly, flagrantly and rebelliously violate the laws and defy the constituted civil authorities of the state; and further recited that a state of insurrection, turmoil, riot and breach of the peace existed in said area, and in addition thereto there was iminent danger of said insurrection, turmoil, riot and breach of the peace, threatening serious danger to citizens and their property, not only in said area but in other areas of this state, and it was therefore necessary for the preservation of the crude petroleum oil and natural gas in said district that the reckless and illegal exploitation be stopped until such time as the said resources may be properly conserved and developed under the pro-
[fol. 49] tection of the civil authorities.

XVIII

In accordance with the foregoing, the respondent Hon. Ross S. Sterling, purportedly acting as the Governor of the State of Texas, but in truth and in fact exceeding the authority vested in said officer, declared that such conditions were clearly violative of the Constitution and laws of the State of Texas, and that by reason thereof "Martial Law" was declared in said counties of Upshur, Rusk, Gregg and Smith, effective at 6 A.M. the 17th day of August, A.D. 1931, and the respondent Hon. Jacob F. Wolters was directed to assume supreme command of the situation in the territory affected, and without delay to completely shut down every producing crude oil well and/or producing well of natural gas, and to further take such steps as he (the said respondent Hon. Jacob F. Wolters) deemed necessary to enforce and uphold the majesty of the law, subject to the orders of the respondent Hon. Ross S. Sterling.

XIX

Your complainants allege that at said time and until September 2, 1931, the Railroad Commission of Texas had not held any hearing or promulgated any order in purported compliance with the said Act of August 12, 1931, and that accordingly there was according to the law (even if said act be valid, which is denied and not admitted) no

law or order under which any authority was given to any officer of the State of Texas to completely stop the production of oil in said area.

[fol. 50]

XX

In this connection your complainants declare that there was no violation of the Conservation Laws of the State of Texas, for the reason that such laws were void, and also that there has been no threats of violence, and that there was absolutely no insurrection, tumult, riot or breach of the peace in the said area hereinbefore defined, nor was there any iminent danger thereof; but that, on the contrary, such purported proclamation and the attempted and alleged finding of facts therein contained was arbitrary, capricious and unjust, and was done with the sole and only purpose in view of preventing or restricting the production of oil in accordance with the agreement, combination and conspiracy in restraint of trade heretofore outlined, and thus affect the price received therefor. That such proclamation and the acts in purported pursuance thereof constitute and have constituted since said date a violation of the laws of the State of Texas and taking of private property without just compensation and without due process of law and impairment of the obligation of contracts, all in violation of the Constitution of the United States, and were done and solely done for the purpose of affecting an economic condition, to wit, the over-production of oil.

XXI

Your complainants respectfully allege that thereafter, to wit, on September 2, 1931, and after a purported hearing held by the Railroad Commission of Texas, in which again the members of the conspiracy, combination and agreement to limit the production of oil, jointly and by agreement, di-

[fol. 51] vided expenses and provided testimony, all for the purposes and considerations of the said combination, conspiracy and agreement, the said Railroad Commission of Texas announced that it had prepared and would issue an order prescribing and limiting the operation of the wells by your complainants so that the total daily production from each well thereon was limited to 225 barrels per day.

XXII

That immediately after said announcement, respondent Hon. Ross S. Sterling publicly announced that he refused to permit the enforcement thereof, that said order permitted too great a production per well and too great a total production from the field and would thereby adversely affect the market price for crude oil, and immediately demanded that the members of the Railroad Commission confer with him in his office at Austin, which was done, and at the insistence of the respondent Hon. Ross S. Sterling, and being then under his domination and control, said order was changed partially to conform to the wishes of the respondent Hon. Ross S. Sterling, and then and thereafter (and only then and thereafter) did the respondent Hon. Ross S. Sterling order the respondent Hon. Jacob F. Wolters to enforce the said order by the use of the military forces under his command, which was done. That such order of the Railroad Commission and the respondent Hon. Ross S. Sterling and the enforcement thereof by the respondent Hon. Jacob F. Wolters was arbitrary, capricious and unjust to these complainants and was in utter destruction of their rights of property and of all admissible and competent testimony before said Commission.

[fol. 52] XXIII

In this connection and prior to this time, the members of said conspiracy, combination and agreement, which by this time included as an active participant the respondent Hon. Ross S. Sterling, had promulgated a proposed and so-called "World Oil Stabilization Programme," the purpose and effect of which and the sole purpose and effect of which was to restrict and limit the production of crude oil within the United States and in the world, in order to affect the market price thereof. That said programme had no relation to and pretended to have no relation to the conservation of crude oil or the preservation of same, but dealt and was intended to deal solely with the situation from an economic point of view, openly, notoriously and purposely intending to raise the price which the consuming public in these United States would have to pay for crude oil and its derivatives; that said "World Oil Programme" or plan was publicly announced on September 11, 1931, and on said

day and date was submitted to and approved by what was known as the "Oil Stabilization Conference" at Oklahoma City in the State of Oklahoma, and then and there became public knowledge, of which this Court can and should take official cognizance. That said conference was attended by, among others, Hon. Cullen F. Thomas, the designated representative of the respondent Hon. Ross S. Sterling, W. S. Farrish, President of the Humble Oil and Refining Company, and other representatives of the Standard Oil of Indiana, the Carter Oil Company, a subsidiary of the Standard Oil of New Jersey, the Shell Petroleum Corporation and others. That the announced purpose of the cur-[fol. 53] tailment of production to a figure within the market demand was to secure "to the producer a fair price for his crude oil," and to the refiners and distributors "a reasonable return," to produce "more royalties and rentals for the farmer," and a "steady revenue for the states."

XXIV

That thereafter, on September 18, 1931, the respondent Hon. Ross S. Sterling, purportedly acting as Governor of Texas, but in violation of his oath and the duties of his office, and contrary to the law, openly entered into said conspiracy, combination and agreement as aforesaid, and joined in the efforts and acts for said purposes and intent as evidenced by said "World Oil Stabilization Programme."

XXV

That said agreement or statement or World Oil Stabilization Programme was reduced to writing, and in the office of and at the direction of and in the presence of the respondent Hon. Ross S. Sterling, and in the presence of the chairman of the Railroad Commission of the State of Texas, the Hon. C. V. Terrell, and in the presence of the two remainnig Railroad Commissioners of the State of Texas, the Hon. Pat M. Neff and the Hon. Lon Smith, and with officials from other states, said agreement and statement was signed for and on behalf of the Hon. Ross S. Sterling by his representative, Hon. Cullen F. Thomas of Dallas, Texas, thereunto duly authorized by the respondent Hon. Ross S. Sterling, and in addition was signed for the Railroad Commission of Texas by the Hon. C. V. Terrell, its Chairman,

[fol. 54] acting for himself and the respondents Hon. Lon Smith and Hon. Pat Neff. That a true copy of said statement is as follows:

"Statement of the Governors and the Regulatory Commission of the Midcontinent States

The Governors of the States of Texas, Oklahoma and Kansas, and the regulatory Commissions of these States, viz: the Railroad Commission of Texas, the Corporation Commission of Oklahoma, and the Public Service Commission of Kansas, having jurisdiction over the conservation of crude petroleum and natural gas, in joint meeting at the State Capitol, Austin, Texas, September 18, 1931, after having considered the world oil stabilization program, submitted and approved at the Oklahoma City, Oklahoma, Oil Stabilization Conference, September 11, 1931, hereby record our hearty approval of the general program and purpose of this conference, in so far as the laws of our respective states permit.

In like manner, we endorse the effect to limit the maximum production to the amounts recommended for the three states, to wit: Texas, 902,000 barrels; Oklahoma 546,000 barrels; and Kansas 110,000 barrels of crude petroleum daily, for the remainder of the year 1931, and pledge ourselves to continue thereafter to co-operate to this end to the extent of our ability.

We take this action in the belief that such program will tend to prevent physical waste and preserve our mineral resources to the people of the states we represent for our [fol. 55] own generation and posterity.

Governor of Texas, by —— ——, His Representative. Governor of Oklahoma, by —— ——, His Representative. Governor of Kansas, by —— ——, His Representative. The Railroad Commission of Texas, by —— ——, Chairman. The Corporation Commission of Oklahoma, by —— ——, Chairman. The Public Service Commission of Kansas, by —— ——, Chairman.

XXVI

That said agreement and statement evidenced a purpose of absolutely restricting the oil production as therein out-

lined, and was an agreement on the part of the respondent Hon. Ross S. Sterling and the members of the Railroad Commission of Texas to use the powers and discretion (if any) purportedly at their disposal for the purpose of accomplishing the advancement of the price of crude oil.

XXVII

That on the same day, to wit, the 18th day of September, 1931, the total production of said East Texas Field exceeded the sum of 400,000 barrels of crude oil, and the total production in the State of Texas exceeded the sum of 902,000 barrels of crude oil, and accordingly, in pursuance of [fol. 56] said agreement to so limit the total production of the State of Texas and the other states and to restrict the output of crude oil in said state, and particularly in the East Texas area, the Railroad Commission of Texas purportedly issued its order, without a hearing, without notice, without an opportunity to be heard, without the presentation of evidence, and without authority of law and without justification, but arbitrarily, capriciously and unjustly, for the sole and only purpose of restricting the output of crude oil in said area within the limits as outlined in said agreement and as agreed upon by the members of the said conspiracy, agreement and combination, so that from that day and thereafter the wells of your complainants and others in the so-called East Texas Field were restricted to a total daily output of 185 barrels per day.

XXVIII

In addition, in this said order the Railroad Commission of Texas ordered and required these complainants to limit the gas-oil ratio to 500 cubic feet of gas in the lifting of one barrel of oil, and this attempted restriction was wholly without facts to support the same and was admittedly only an experiment or guess, but was done for the purpose of further restricting the production of crude oil and thereby affecting the price thereof; that such gas-oil ratio is extremely variable in each of the 2,500 wells in the so-called East Texas Field, and also varies as each new well is completed and opened, and no just or reasonable ratio can be prescribed.

[fol. 57] XXIX

That said order and said restriction, and also the purported order of September 2, 1931, were enforced by the presence, under arms and in the uniform of the military of the State of Texas, and under the command and direction of the respondents, the Hon. Ross S. Sterling and the Hon. Jacob F. Wolters, and such enforcement was done and solely done in accordance and with the plan and intention to limit and restrict the production of crude oil and petroleum in the United States and in the said area for the purpose of affecting the price to be received therefor.

XXX

Thereafter, and on October 10, 1931, new wells having been continuously drilled in the so-called East Texas Field, the total production again exceeded the amount of 400,000 barrels, and in the state the sum of 902,000 barrels, and again, without hearing, without notice, without evidence, without justification and without authority, but arbitrarily, capriciously and unjustly, and for the sole and only purpose of effecting a restriction upon the production of crude oil and thereby affecting the price to be received therefor, the Railroad Commission of Texas, in accordance with its agreement as expressed in its statement of date September 18, 1931, again reduced the per well allowable of your complainants so that the wells producing oil upon the property of your complainants were limited and restricted to a total daily production of 165 barrels per day.

[fol. 58] XXXI

That then and thereafter and until October 13, 1931, and in pursuance of said plan and scheme and for the sole and only purpose of affecting the price to be received for crude oil, the respondents Hon. Ross S. Sterling and Hon. Jacob F. Wolters, by force of arms, compelled these complainants to so restrict the output of crude oil from their wells as set out in said order; that said order and the enforcement by these respondents and by each of them, was arbitrary, capricious and unjust and without foundation in fact or in law, and was contrary to the laws and Constitution of both the State of Texas and of the United States as aforesaid.

XXXII

That thereafter, and on the 13th day of October, 1931, the original petition in this cause was filed with the Clerk of the United States District Court for the Eastern District of Texas, and the application for temporary restraining order therein contained was presented to the Judge of said Court, and by him considered, and thereafter, as will more readily appear from the papers on file in this proceeding, said temporary restraining order was granted for the purpose and to the effect of preventing the interference with the operation of these complainants' wells in the production of oil therefrom to the extent of 5,000 barrels per day. That shortly thereafter the bond, as required by said order, was deposited, filed and approved by the Clerk of this Honorable Court, and the notices of said injunction were issued to the respondents in said cause. Thereupon, [fol. 59] and after the receipt of said notice, the respondent Hon. Jacob F. Wolters notified the respondent Hon. Ross S. Sterling of the issuance of same, and orally and without authority and without justification or cause, but arbitrarily, capriciously and unjustly, and for the purpose of limiting and restricting the output of crude oil and thereby affecting the price thereof, the said respondent Hon. Ross S. Sterling ordered the respondent Hon. Jacob F. Wolters to continue to restrict or limit the output of the wells of your complainants to 165 barrels per day, and that from and after that time the said respondent Hon. Jacob F. Wolters was to take full control of said field and to receive orders only from the respondent Hon. Ross S. Sterling, and particularly to refuse to obey the restraining order which had been on that day granted by this Honorable Court.

XXXIII

That the respondent Hon. Jacob F. Wolters thereupon issued the following order:

"Headquarters Military District of Upshur, Rusk, Gregg, and Smith Counties

General Orders No. 15

Camp Parrish,
Kilgore, Texas, 13 October 1931.

(1) The Governor of Texas has issued the following proclamation:

[fol. 60] "Whereas, by Proclamation No. 8447, dated August 16, 1931, you were directed to 'Assume military command in the territory affected (in the counties of Gregg, Upshur, Rush and Smith, in the State of Texas), and without delay to shut down each and every producing oil well and/or producing well of natural gas, and to further take such steps as he (you) deem necessary to enforce and uphold the majesty of the law, subject to the orders of the Governor of Texas and Commander in Chief of the Military Forces of this state as given through the Adjutant General'; and,

Whereas, according to facts presented to me by reliable persons, it is evident that said organized, entrenched groups of crude petroleum oil and natural gas producers in said East Texas Oil Fields are threatening and planning to openly violate the conservation laws of the State, and threaten by violence, if necessary, to create and carry on a waste of crude petroleum oil and natural gas, in open rebellion against the efforts of the constituted civil authorities of this state, to enforce such orders and the conservation laws of this state.

Now, therefore, you are hereby commanded to issue and promulgate as the orders of the Governor of Texas and Commander in Chief of the Military Forces of this State, an order allowing not exceeding 165 barrels of crude petroleum oil to be produced per day from any well in the Military Zone as defined in said original Proclamation No. 8447, and to put same into full effect as the military orders of [fol. 61] your command until otherwise ordered.

The original Proclamation No. 8447, dated August 16th, 1931, is hereby continued in full force and effect, subject to this order."

(2) Pursuant to said proclamation, no well in the Military District will be permitted to produce per day in excess of 165 barrels of crude petroleum oil.

(*2*) The following reports will be submitted to Military Headquarters through the channels heretofore used:

(a) Producers will furnish on or before high noon of each day a statement of the number of barrels of crude petroleum oil produced by wells on previous day. This statement to include producer's name, well number, lease and survey

on which said well is located. A day constitutes 24 hours beginning and ending in 7.00 A. M.

(b) All purchasers of crude petroleum oil, including oil to be used for fuel, for the drilling of additional wells, all pipe line companies, whether operating as common carriers or gathering lines, all railroad companies who receive, load and transport crude petroleum oil, all refineries of crude petroleum oil located within the Military District, operators of tank wagons or tank trucks used for the purpose of transporting crude petroleum oil, and all other purchasers or users or transporters of crude petroleum oil shall on or before high noon each day report to Military Headquarters, in writing properly certified as a true and correct statement, the amount of crude petroleum oil purchased, transported, received, loaded and/or stored during the preceding [fol. 62] day. This report shall include names of corporations, associations of persons, parties, firms, trustees, receivers, and/or any concern or organization whatever, from whom received and/or purchased, the lease from which purchased, and/or received, and the well numbers on said lease from which purchased and/or received.

(4) General Orders Nos. 10, 12 and 14 are rescinded.

(5) The Provost Marshall will enforce this General Order.

By Command of Brigadier General Wolters.
John W. Neville, 1st Lt. Cavalry, T. N. G., Adjutant.

Official.
John W. Neville, 1st. Lt.Cavalry, T. N. G., Adjutant.
(Seal.)

Distribution "A."

XXXIV

That the respondent Hon. Jacob F. Wolters, before receipt of such written proclamation from the respondent Hon. Ross S. Sterling, and afterward, under force of arms and by threats of violence, unlawfully and without authority, commanded and ordered various men then under his charge to proceed to the properties of these complainants and completely shut down all production from the wells thereon and

[fol. 63] to cause same to remain shut down until such time as the total amount of oil produced in excess of 165 barrels per day should equalize, at 165 barrels per day, the number of days said wells should be shut down, and thereafter to permit no greater production than 165 barrels per day.

XXXV

In addition thereto and at the command and direction of the respondent Hon. Ross S. Sterling, the respondent W. W. Sterling ordered and commanded persons under his control, to wit, "Texas Rangers" to assist the respondent in the acts hereinbefore outlined, and such Rangers were sent to said area and assisted in such acts.

XXXVI

That then and thereafter, on the 28th day of October, 1931, without any action on the part of the Railroad Commission, without any hearing or notice or opportunity to be heard, without any authority or justification or excuse other than the agreements herein outlined, and to restrict the production of crude oil and to affect the price to be received therefor, the said respondent Hon. Ross S. Sterling commanded (and the respondent Hon. Jacob F. Wolters, under force of arms and with threats of violence, compelled obedience thereto) that the wells of these complainants and others in the East Texas Field should be permitted to produce no greater amount of oil than 150 barrels per day. In this connection, your complainants allege that the total production from the East Texas Field, by recent completion of [fol. 64] new wells, had again exceeded the total sum of 400,000 barrels per day, and that therein and thereby the total production from the State of Texas was made to exceed considerably more than the sum of 902,000 barrels per day.

XXXVII

Your complainants allege that the orders of the Railroad Commission heretofore described, by their own terms expired as of the 31st day of October, and from and after said date (and from and after October 13, 1931) the Railroad Commission has exercised and attempted to exercise no supervision over the production of wells of either oil or gas in said area; but that the respondents, Hon. Ross S. Ster-

ling, Hon. W. W. Sterling and Hon. Jacob F. Wolters, have, by the use of force at their command and under arms and with threats of violence since said date, October 31, 1931, compelled these complainants to so restrict the production from their wells of oil and gas as outlined hereinbefore.

XXXVIII

Your complainants further allege that on November 7, 1931, the total production from the East Texas Field again exceeded the sum of 400,000 barrels and the total for the State of Texas exceeded the sum of 902,000 barrels and was daily increasing above such figures, and because of such fact and in accordance with the purpose, plan and design to restrict and limit the production of crude oil in the United States and in said particular area, and without any right or authority, or any order or hearing or notice of any such [fol. 65] hearing by and before the Railroad Commission of Texas or before the respondents, the respondent Hon. Ross S. Sterling commanded and required your complainants on the 7th day of November to again reduce the production from their well or wells to an amount not to exceed 125 barrels per day, and that such order or command on the part of the respondent Hon. Ross S. Sterling was executed and enforced by force of arms by the respondents Hon. Jacob F. Wolters and Hon. W. W. Sterling. That such order is arbitrary, capricious and unjust to these complainants and without foundation in fact or in law and contrary to the Constitution of the State of Texas and the United States.

XXXIX

That in addition thereto your complainants are informed and believe and therefore allege the fact to be that the respondent Hon. Ross S. Sterling is preparing to promulgate, and unless the relief herein prayed is granted, the respondents Hon. Jacob F. Wolters and Hon. W. W. Sterling will enforce, by superior number of men and under force of arms and under threats of violence, an order wherein and whereby the production from the wells of your complainants will be limited to a total production equal to four barrels per day per acre, upon a computation of the acreage included within each tract herein described. That such plans,

scheme or order is in accordance and design with the purpose and intent of the respondents to further limit the production of crude oil in the so-called East Texas Field and [fol. 66] thus affect the price thereof; that the plan or scheme is one which has been rejected by the Railroad Commission of Texas (if that body has any power to accept or reject and such scheme, which your complainants deny) and was without notice or hearing accorded to your complainants, and is openly, plainly and intentionally an attempt indirectly to limit or restrict the drilling of new wells in said East Texas Field, thereby preventing said field from producing a total at any time in excess of 400,000 barrels, which is the figure arbitrarily, capriciously and unjustly assigned by these respondents to the production of said field.

XL

That said order, scheme or plan and the orders in compliance therewith, are wholly without justification in law or in fact, are arbitrary, capricious and unjust, and constitute a taking of your complainants' property without just compensation, without due process of law, and cause, force and compel an impairment of the obligation of contracts, contrary to the Constitution of the State of Texas and the United States in the applicable provisions thereof.

XLI

In this connection your complainants allege that not only was it the intention of respondents, by their joint acts, to raise the price paid for crude oil, but also that such acts have in fact raised such price from ten cents per barrel to 83 cents per barrel, and in addition have caused an increase [fol. 67] in the price of products which are refined from crude oil.

XLII

That all of the foregoing orders, both of the Railroad Commission and of the respondent Hon. Ross S. Sterling, as hereinbefore outlined, are intentionally, openly and notoriously based upon an attempt on the part of said respondents to treat all of the land embraced within the area of the so-called East Texas Field as a common pool, and the purpose and intent of such orders was to prevent the extraction of oil by your complainants only and solely in a

ratable proportion as all other owners of such lands in said East Texas Field might be so permitted to withdraw oil; and that no discrimination or distinction has been shown or made in any of said orders or proposed orders whereby and wherein each individual owner, and particularly your complainants, might be treated upon the theory of ownership other than as the owner of a portion of a common pool; and that such theory and the orders based thereon required and commanded your complainants, who are the owners of favorable and well situated leases with heavily saturated sand and with great depth and thickness thereof, to permit the extraction of some portion of the oil underlying their property by other and less favorably situated leaseholders in said pool, all of which is contrary to the Constitution of the State of Texas and of the United States.

[fol. 68] XLIII

Further, your complainants aver that during all of the period from the 16th day of August, 1931, to the date of the filing of this amended bill, the respondents Hon. Ross S. Sterling, Hon. W. W. Sterling and Hon. Jacob F. Wolters, and those acting under them and in concert with them, have not made one single, solitary effort to suppress any riot, turmoil, civil commotion, bloodshed, uprising, destruction of property, or any other forms of violence in the so-called East Texas Field, nor have they made any move to apprehend any parties who threatened any danger of any such acts as aforesaid, nor have any efforts been made to protect the properties in said area, but that, on the contrary, the force of military persons originally numbering over 1100 men has now been reduced to less than 150, and the only effort and the only rules promulgated by said authorities have been with the view to restrict and limit the production of wells on said properties in an arbitrary, capricious and unjust manner, and that the allegation or the finding or the pretense of any facts necessary for martial law is false and a sham to cloak and conceal an attempt to exercise a power not granted to these respondents under the laws of the United States or of the State of Texas.

XLIV

In this connection, further, your complainants allege that the military officials and those powers under the command

of the respondents Hon. Ross S. Sterling, Hon. W. W. [fol. 69] Sterling and Hon. Jacob F. Wolters, have never, in accordance with the laws of the State of Texas, attempted or offered to said civil authorities in said area to enforce the civil laws or said area, nor have they received or obeyed, as required by law, any orders of the civil authorities charged by law with the preservation of the public peace; that there has been no request on the part of the civil authorities for the use of such military forces, that all courts in said area are open and transacting their ordinary business, and there has been no failure of such civil authorities nor of the people within said area, nor will they fail or refuse to obey the mandate of any court therein; that there are no armed bodies of civilians in said area nor are there any bodies of men threatening bloodshed, violence or destruction; but that, on the contrary, the citizens in said community are in a quiet, peaceable condition and amenable and obedient to any process which might be served upon them.

XLV

Your plaintiffs allege that by reason of the terms of the Act of the 42nd Legislature, known as Chapter 26, House Bill 25, providing penalty in addition to the fines for contempt of such orders of said Railroad Commission, in an amount of not more than $1,000.00 for each day of such so-called violation, such penalty to be recovered by suits therefor instituted by the Attorney General of Texas and/or by the County Attorney of Rusk County, they have heretofore been intimidated into the complaining of such course as heretofore set out, and that a failure or refusal to further comply therewith will bring upon themselves expensive and [fol. 70] vexatious suits for the collection of the so-called penalties, unless the relief herein prayed for be granted.

Wherefore, premises considered, your complainants pray that, without prejudice or effect upon or dissolution of the temporary restraining order heretofore issued in this cause, this Honorable Court — issue its order commanding and requiring these defendants upon a day certain (not within five days of the filing of this bill) to be and appear before this Court and show cause why they and their officers, agents, servants, employes and parties in privity with them,

should not be temporarily restrained and enjoined, pending the further orders of this Court, from in any manner or method interfering with these plaintiffs in the production of oil up to 5,000 barrels per day for each well and/or operation of their wells from and on the property described in this bill of complaint, and from seeking or attempting to seek to impose penalties and fines therefor, or to imprison and detain these plaintiffs, their agents or servants, by reason of such production and/or operation.

That these defendants be cited to appear and answer according to law hereunto, that upon final hearing such temporary restraining order be made permanent; that these plaintiffs have decree for their damages of $100,000.00, for costs of suit and for such other and further relief to which they may show themselves justly entitled.

Bailey, Nickels & Bailey, by (Signed) Jos. W. Bailey, Jr., Solicitors for Plaintiffs.

[fol. 71] *Duly sworn to by Jos. W. Bailey, Jr. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 72] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO BILL OF COMPLAINT—Filed Jan. 5, 1932

To said Honorable Court:

Leave of the Court having been had, Plaintiffs file and present this pleading amending and supplementing paragraph XXXVII, Page 27, of their First Amended Original Petition and Bill of Complaint by adding, at the end of such paragraph (and averring) the following:

"And in so doing, and in proposing and threatening to continue to do such and like acts, the respondents have acted and/or claimed to act and will continue to act under authority or claimed authority, and in claimed enforcement of the aforesaid Chapter 26, House Bill 25, Acts of 42nd Legislature of Texas, which statute and the acts of

respondents in purported authority thereof are and will be void, because contrary to the Constitution of the State of Texas and of the United States as herein before set out.

Bailey, Nickels & Bailey, (Signed) by Jos. H. Bailey, Jr., Solicitors for Complainants.

[fol. 73] *Duly sworn to by Jos. W. Bailey, Jr. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 74] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFFS' FIRST SUPPLEMENTAL PETITION RESPONDING TO DEFENDANTS' ANSWER—Filed Jan. 4, 1932

To said Honorable Court:

Come now E. Constantin and J. D. Wrather, Plaintiffs, in the above styled and numbered cause and (with leave of the Court first had and obtained) file and present this their First Supplemental Petition therein, responding to matters and things stated and averred in the Answer filed by the Defendants and supplementing the averments contained in Plaintiffs' First Amended Original Petition,—and therefor say:

I

Plaintiffs deny the allegations contained in sub-paragraph C, sub-division XVII, and in other portions of the Answer of the Defendants R. S. Sterling, W. W. Sterling, and Jacob F. Wolters, in words or to effect that the so-called "Executive Proclamation No. 8447" and/or any other proclamation or order issued or promulgated by the Defendants or any of them and any and all action or conduct of the Defendants thereunder or in supposed virtue thereof was promulgated, issued, or done in exercise of power vested in Defendant R. S. Sterling, Governor of Texas, or in any of the other Defendants "by the consti-[fol. 75] tution and laws of the State of Texas."

But if, as, and to the extent that any provision of the constitution of Texas vests or purports to vest any such authority, power, or discretion in Defendant R. S. Sterling as Governor of Texas, then such provision or provisions is without effect lawfully to vest such power, authority, or discretion or to justify such use thereof and is unconstitutional and void for that same has the effect of and so operates as to deprive Plaintiffs and each of them of their liberty, property, and rights incident and appertaining thereto in violation of that clause of the Fourteenth Amendment of the Constitution of the United States wherein and whereby a state is inhibited from depriving any person of life, liberty, or property without due process of law, and wherein and whereby a state is inhibited from denying to any person within its jurisdiction the equal protection of the law.

And if, as, and to the extent that any statute of the State of Texas (particularly Articles 5830, 5831 and/or 5833, Revised Civil Statutes of Texas, 1925) vest or purport to vest in Defendant R. S. Sterling, Governor of Texas, or in any of the other Defendants, any such power, authority, or discretion, same does not lawfully so vest any such power, authority, or discretion, but is unconstitutional, void, and without effect to vest or justify use of any such power, authority, or discretion and/or to warrant or justify any act or conduct of the Defendants complained of by Plaintiffs because same was and is in violation:

[fol. 76] 1. Of Section 24 of Article I of the Constitution of Texas wherein and whereby it is required that "the military shall at all times be subordinate to the civil authority."

2. Of Section 28 of Article I of the Constitution of Texas wherein and whereby it is provided that "no power of suspending laws in this State shall be exercised except by the Legislature."

3. Of Section 1 of Article III, and of Section 1 of Article II, of the Constitution of Texas wherein and whereby legislative power is vested in a Senate and House of Representatives which together shall be styled "the Legislature of Texas" and wherein and whereby use of legislative and/or

judicial power by the Governor of Texas or under his direction or order is prohibited.

4. Of Sections 13, 17, and 19 of Article I of the Constitution of Texas wherein and whereby it is provided, respectively, that "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law" and "no person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made" and "no citizen of this State shall be deprived of life, liberty, property, privileges, or immunities * * * except by the due process of the law of the land."

5. Of that provision of the Fourteenth Amendment of the Constitution of the United States wherein and whereby it is provided "nor shall any State deprive any person of life, liberty, or property without due process of laws."

6. Of that provision of the Fourteenth Amendment of the Constitution of the United States wherein and whereby [fol. 77] it is provided that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

7. Of that provision of Paragraph 1 of Section 10 of Article I of the Constitution of the United States wherein and whereby it is provided that "no state shall * * * pass any * * * law impairing the obligation of contracts" and of that term of Section 16 of Article I of the Constitution of the State of Texas wherein and whereby it is provided that "no * * * law impairing the obligation of contracts shall be made."

8. Of those terms of Paragraph 2 of Article VI and of Sections 1 and 2 of Article III of the Constitution of the United States wherein and whereby, respectively, it is provided that the Constitution and laws of the United States made in pursuance of such constitution "shall be the supreme law of the land" and that the "judicial power of the United States shall be vested in one supreme court and in such inferior courts as the Congress may, from time to time, ordain and establish" and that "the judicial power shall extend to all cases in law and equity arising under"

the constitution and laws of the United States and of the statutes of the United States whereby this Honorable Court has been established and created and jurisdiction vested in it extending to and over all parties to the cause and the subject matter thereof,—it being averred (as is in truth shown by the record in the cause) that this Honorable Court has long since acquired jurisdiction of and over all parties to the cause and the subject matter thereof and has heretofore exercised such jurisdiction, and it being further [fol. 78] shown that the acts and conduct of the Defendants (more specifically averred in Plaintiffs' First Amended Original Petition), if same be in any manner or to any extent attempted to be authorized or warranted by any provision of the Constitution or the statutes of the State of Texas, have had, do now have, and will continue to have the effect and result (and any such provision of the Constitution or statutes of the State of Texas as may attempt to authorize or warrant such acts or conduct have had, do now have, and will continue to have the effect and result) of interfering with, impairing and/or defeating and thwarting the jurisdiction and power of this honorable Court and of interfering with and impairing the effect of and/or defeating and thwarting the meaning and intended effect of the aforesaid provisions of the Constitution and laws of the United States.

In connection with and in support of the foregoing averments and supplementary of the averments contained in Plaintiffs' First Amended Original Petition, it is alleged and shown:

a. That, as generally shown in Plaintiffs' First Amended Original Petition, Plaintiffs, pursuant to the Constitution and laws of the State of Texas and of the United States, heretofore acquired and became vested with the ownership of the whole or, at least, substantial part, of the oil and/or gas in, under, and producible from the land described in their First Amended Original Petition, together with the right to produce from such lands such oil and/or gas,—having acquired such ownership and rights by and under [fol. 79] valid and effective contracts entered into by the State of Texas, on the one hand, and other persons (whose rights Plaintiffs now own and have), on the other hand, and by mesne valid and lawful contracts and conveyances.

b. The acts and conduct of the Defendants (more particularly described in Plaintiffs' First Amended Original Petition) have had the effect, do now have the effect, and (if continued) will have the effect of substantially and materially impairing, defeating and/or destroying the aforesaid ownership and/or rights and properties of Plaintiffs secured in and by the aforesaid contracts.

c. Plaintiffs' aforesaid properties and rights and the right to avail themselves of judicial and other remedies being provided for and secured in and by the aforesaid provisions of the Constitutions and laws of the United States and of the State of Texas, the acts and conduct of the Defendants (more particularly described in Plaintiffs' First Amended Original Petition) have had the effect, do now have the effect, and (if continued) will have the effect of suspending provisions of the Constitutions and laws of the United States and of the State of Texas by and through denial to Plaintiffs, in whole or in substantial part, the use, values, and benefits of their aforesaid properties and contract rights secured, as aforesaid, by and in such constitutions and laws.

d. The acts and conduct of the Defendants (more particularly described in Plaintiffs' First Amended Original Petition) and possession and/or use of the powers, discretion and/or authority claimed and used by the Defendants [fol. 80] have had, do now have, and (if continued) will have the effect of suspension (by others than the Legislature of Texas) of the laws of Texas in whole or in substantial part and of rendering and making the military power superior to the civil authority.

e. The acts and conduct of the Defendants (more particularly described in Plaintiffs' First Amended Original Petition) consist of and/or involve the use (by non-legislative and non-judicial persons and officers) of legislative and/or judicial power and authority and the powers, discretion, and authority claimed by the Defendants (as more particularly described in Plaintiffs' First Amended Original Petition and in Defendants' Answer) were and are arbitrarily and capriciously claimed and the user of such power, authority, and discretion, as so described, and each and every act and thing done therein and thereunder was and

is wholly capricious and arbitrary, and neither the assumption of such power, authority, and discretion, nor the use thereof, nor any act or thing done thereunder pursuant thereto was and is justified or warranted by any condition of fact or of law; and such claims, assumptions, and users, and each act done pursuant thereto or thereunder was not done in good faith or for the good faith purpose of causing the laws to be executed or to suppress or prevent insurrection, riot, tumult, breach of the peace, and is wholly arbitrary and capricious and for improper and unlawful purposes.

f. If, as, and to the extent that said statutes of the State of Texas (particularly said Articles 5830, 5831, and/or 5833, Revised Civil Statutes of Texas, 1925) purport or [fol. 81] attempt to vest in R. S. Sterling, Governor of Texas, or in any of the other Defendants, the power, authority, or discretion claimed and/or used by them as shown in Plaintiffs' First Amended Original Petition and/or in the Answer of said Defendants, the same is without effect, unconstitutional, and void because in violation of the aforesaid Sections 13, 17, and 19 of Article I of the Constitution of Texas, and of the aforesaid clause of the Fourteenth Amendment of the Constitution of the United States wherein it is declared "nor shall any State deprive any person of life, liberty, or property without due process of law" because such statute or statutes are so inedfinite, vague, ambiguous, and general in their terms as to operate (if enforced and/or as attempted to be enforced against Plaintiffs as alleged) so as to deprive Plaintiffs of their liberty, property, and rights incident thereto without due process of law, and because same do not define or sufficiently define any standard of conduct or guide for the use of the power or authority therein referred to, but, upon the contrary (if enforced and as attempted to be enforced as against Plaintiffs and in respect of Plaintiffs' properties), so operate as to subject Plaintiffs and other persons and their liberty, rights, and properties and enjoyment thereof to the unrestricted will, discretion, whim, caprice, or malice of the Governor of Texas and/or those acting and/or claiming to act under and in claimed authority of the orders and direction of the Governor of Texas.

[fol. 82] II

Plaintiffs specifically deny the allegations contained in sub-division N and elsewhere in the Answer of the Defendants R. S. Sterling, W. W. Sterling, and Jacob F. Wolters in words and to effect that the matters and things done by the Defendants were or are "necessary to be done for the administration of martial law and either to suppress insurrection, tumult, riot, and breach of the peace, or to prevent imminent insurrection, tumult, riot, and breach of the peace or disorders" and say, upon the contrary, that insurrection, or tumult, or riot, or breach of the peace, or imminent danger of the same has never existed, does not exist, and will not exist in the so-called "military district" referred to in such pleading. Furthermore Plaintiffs say that if at any time any such insurrection, tumult, riot, or breach of the peace or imminent danger thereof ever existed at any time within the said so-called "military district" same has long since disappeared and does not now exist and will not exist in the future.

III

Wherefore, Plaintiffs pray for relief as in their First Amended Original Petition prayed, and for such other relief, both general and special, to which they may be entitled.

Bailey, Nickels & Bailey, by Jos. W. Bailey, Jr., Solicitors for Plaintiffs.

[fol. 83] *Duly sworn to by Jos. W. Bailey, Jr. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 84] In United States District Court

[Title omitted]

Answer to Plaintiffs' First Amended Original Petition and Bill of Complaint—Filed Dec. 23, 1931

To said Honorable Court:

Come now R. S. Sterling, Governor of Texas; W. W. Sterling, Adjutant General of the State of Texas; and Jacob

F. Wolters, Brigadier General, Texas National Guard, Defendants herein; and leave of the Court being had and obtained, file this their Answer to Plaintiffs' First Amended Original Petition and Bill of Complaint, and for such Answer respectfully show unto the Court the following:

I

A. Defendants admit that R. S. Sterling is Governor of the State of Texas and resides in Austin, Texas.

Defendants admit that W. W. Sterling is Adjutant General of the State of Texas and resides in Austin, Texas.

Defendants admit that Jacob F. Wolters is a resident of Texas and may be found at Kilgore, Rusk County, Texas.

B. Defendants are without knowledge of the facts alleged in Paragraph 1 of Plaintiffs' Petition except those facts herein specifically admitted.

[fol. 85]

II

Defendants are without knowledge of the facts alleged in Paragraph 2 of Plaintiffs' Petition.

III

Defendants are without knowledge of the facts alleged in Paragraph 3 of Plaintiffs' Petition.

IV

A. Defendants deny that Plaintiffs have by reason of the facts and circumstances alleged in Plaintiffs' Petition been compelled to delay the drilling of additional wells upon the tracts of land described in Plaintiffs' Petition.

B. Defendants are without knowledge of the facts alleged in Paragraph 4 of Plaintiffs' Petition except the fact herein specifically denied.

V

A. Defendants admit that there are wells in "said field" which are drilled into the thick strata of oil-bearing sand and which, to permit any such flow as 5,000 barrels per day, would undoubtedly infuse water into the oil-bearing strata.

Defendants admit that there are wells in said field, which by reason of having been drilled too deeply, have penetrated the oil-bearing strata and into the water underlying same, which said wells might and could possibly by "coning" or otherwise infuse water into the oil-bearing strata.

Defendants admit that the wells upon Complainants' own property are treated the same and are limited to the [fol. 86] same output as all wells in "said Field."

B. Defendants are without knowledge of the facts alleged in Paragraph 5 of Plaintiffs' Petition except those facts herein specifically admitted.

VI

A. Defendants deny that the "attempted or ordered reduction by the Commission for the production of gas in the relation of 500 cubic feet of gas to one barrel of oil was based upon any desire or intent whatever of these Defendants."

B. Defendants are without knowledge of the facts alleged in Paragraph 6 of Plaintiffs' Petition except the fact herein specifically denied.

VII

Defendants are without knowledge of the facts alleged in Paragraph 7 of Plaintiffs' Petition.

VIII

A. Defendants deny that each of the properties described in Plaintiff's Petition are capable of producing an income of $50,000 per month.

Defendants deny that by reason of the acts of Defendants the income from said properties is reduced to $3,000 or less per month.

Defendants deny that by their acts and conduct complained of in Plaintiffs' Petition, Plaintiffs have suffered a loss of income and damage since September 2, 1931, to the extent of $100,000 or any part thereof.

[fol. 87] Defendants deny that unless the relief prayed by Plaintiffs is granted, Plaintiffs will suffer an additional loss of $1,500, or any part thereof, for each day of the con-

tinuation of the acts of Defendants, complained of in Plaintiffs' Petition.

B. Defendants are without knowledge of the facts alleged in Paragraph 8 of Plaintiffs' Petition except those facts herein specifically denied.

IX

A. Defendants move the Court to Strike from Paragraph 9 of Plaintiffs' Petition each and every allegation therein contained, because the same are mere conclusions of the pleader, unsupported by any averment of fact, and even if true, are wholly immaterial to any issue or possible issue involved herein.

B. Subject to its foregoing Motion to Strike, Defendants say that they are without knowledge of the facts alleged in Paragraph 9 of Plaintiffs' Petition.

X

A. Defendants move the Court to Strike from Paragraph 10 of Plaintiffs' Petition each and every allegation therein contained, because the same are mere conclusions of the pleader, unsupported by any averment of fact, and even if true, are wholly immaterial to any issue or possible issue involved herein.

B. Subject to their Motion to Strike, these Defendants say that they are without knowledge of the facts alleged [fol. 88] in Paragraph 10 of Plaintiffs' Petition, and in this connection Defendants say that if any such conspiracy existed as alleged by Plaintiffs, none of these Defendants had knowledge thereof, or was, or is a party thereto.

XI

A. Defendants move the Court to Strike from Paragraph 11 of Plaintiffs' Petition each and every allegation therein contained, because the same are mere conclusions of the pleader, unsupported by any averment of fact, and even if true, are wholly immaterial to any issue or possible issue involved herein.

B. Subject to their Motion to Strike, Defendants say that they are without knowledge of the facts alleged in

Paragraph 11 of Plaintiffs' Petition, and in this connection Defendants say that if any such conspiracy existed as alleged by Plaintiffs, none of these Defendants had knowledge thereof, or was, or is a party thereto.

XII

A. Defendants move the Court to Strike from Paragraph 12 of Plaintiffs' Petition the allegation "that the brother of the Respondent, Hon. Ross S. Sterling, is at present an executive Vice President of said Company" ("said company" referring to the Humble Oil & Refining Company), because said allegation is immaterial and irrelevant to any issue herein.

Defendants move the Court to Strike from Paragraph 12 of Plaintiffs' Petition the allegation "that the relations of the said Respondents, Hon. Ross S. Sterling and Hon. [fol. 89] Jacob F. Wolters, with said two corporations" ("said two corporations" referring to the Humble Oil & Refining Company and The Texas Company) "is so close and intimate as to disqualify them from action and judgment in the premises," because said allegation is a mere conclusion of the pleader, unsupported by any averment of fact and necessarily speculative, and is immaterial and irrelevant to any issue herein.

B. Subject to their Motions to Strike, Defendants admit that R. S. Sterling was for many years financially interested as a large stockholder, director, and officer of the Humble Oil & Refining Company.

Subject to their Motions to Strike, Defendants admit that Jacob F. Wolters is an attorney in the regular employ of The Texas Company.

C. Subject to their Motions to Strike, Defendants deny that R. S. Sterling borrowed from the Humble Oil & Refining Company, a sum, or sums of money, in excess of $400,000 and less than $1,000,000, or any part thereof.

Subject to their Motions to Strike, Defendants deny that R. S. Sterling at present owes the Humble Oil & Refining Company a sum, or sums of money, in excess of $400,000 and less than $1,000,000, or any part thereof.

Subject to their Motions to Strike, Defendants deny that R. S. Sterling has ever been, or now is, indebted to

the Humble Oil & Refining Company in any amount whatsoever.

D. Subject to their Motions to Strike, Defendants say that they are without knowledge of the facts alleged in Paragraph 14 of Plaintiffs' Petition except those facts herein specifically admitted or denied.

[fol. 90]

XIII

A. Defendants move the Court to strike from Paragraph 13 of Plaintiffs' Petition each and every allegation therein contained, because each of said allegations is immaterial and irrelevant to any issue herein.

B. Subject to their Motion to Strike, Defendants say that they are without knowledge of the facts alleged in Paragraph 13 of Plaintiffs' Petition, and in this connection Defendants say that if any such conspiracy existed as alleged by Plaintiffs, none of these Defendants had knowledge thereof, or was, or is a party thereto.

XIV

A. Defendants move the Court to Strike from Paragraph 14 of Plaintiffs' Petition each and every allegation therein contained, because they are too vague and indefinite to furnish to Defendants or the Court any information as to what "parties" are alleged to have performed the acts therein alleged to have been performed, are mere conclusions of the pleader, unsupported by any averment of fact and are immaterial and irrelevant to any issue herein.

B. Subject to their Motion to Strike, Defendants admit that orders were issued by the Railroad Commission of Texas in the months of April, 1931, and June, 1931, limiting the amount of oil to be produced by each and every well in the so-called East Texas Oil Fields, comprising the Counties of Gregg, Upshur, Rusk, and Smith, to approximately 500 barrels per day.

C. Subject to their Motion to Strike, Defendants say that [fol. 91] they are without knowledge of the facts alleged in Paragraph 14 of Plaintiffs' Petition except those facts herein specifically admitted, and in this connection Defendants say that if any such conspiracy existed as alleged

by Plaintiffs, none of these Defendants had knowledge thereof, or was, or is a party thereto.

XV

A. Defendants move the Court to Strike from Paragraph 15 of Plaintiffs' Petition each and every allegation therein contained, because the same are immaterial and irrelevant to any issue herein.

B. Subject to their Motion to Strike, Defendants say that they are without knowledge of the facts alleged in Paragraph 15 of Plaintiffs' Petition.

XVI

A. Defendants admit that the Forty-Second Legislature of the State of Texas met pursuant to the call of the Governor in its First Called Session, and on August 12, 1931, passed a law known as House Bill No. 25, relating to powers and duties of the Railroad Commission of Texas in respect to conservation of oil and gas, and that said Act was approved and became effective on the 12th day of August, 1931.

B. Defendants deny that House Bill No. 25 and the actions of Defendants in compliance thereunto, or either said Acts or said House Bill 25, are void and of no force and effect and contrary to the Constitution of the State of [fol. 92] Texas, or the United States, in any of the particulars alleged in subparagraphs a, b, c, d, e, and f, of Paragraph 16 of Plaintiffs' Petition.

Defendants deny that the actions of them, or any of them, have been in "purported" compliance with House Bill No. 25, and say that any actions of these Defendants, or any of them, under said House Bill No. 25, have been in "actual" compliance thereunto.

XVII

A. Defendants move the Court to Strike from Paragraph 17 of Plaintiffs' Petition the following language: "and when the production of crude oil in the State of Texas again greatly exceeded the demand therefor, because of which fact the price received and paid for such crude oil had gone down to approximately ten cents per barrel in the East

Texas Field," for the reason that said language is a mere conclusion of the pleader not based upon any averment of fact, is necessarily speculative, and is immaterial and irrelevant to any issue herein.

Defendants move the Court to Strike from Paragraph 17 of Plaintiffs' Petition the following language: "purportedly acting in his capacity as Governor of the State of Texas, but in truth and in fact far exceeding the authority given to the holder of said office under the terms and provisions of the Constitution of the State of Texas and the United States of America and the statutes made in pur- [fol. 93] suance thereof," because the same is a mere conclusion of the pleader based upon no averment of fact, is necessarily speculative, and is immaterial and irrelevant to any issue herein.

Defendants move the Court to Strike from Paragraph 17, Line 11, of Plaintiffs' Petition the word, "purported," because the same is a mere conclusion of the pleader based upon no averment of fact.

B. Subject to their Motions to Strike, Defendants admit that R. S. Sterling, Governor of Texas, on the 16th day of August, 1931, issued and promulgated Executive Proclamation No. 8447, wherein he declared that a state of insurrection, tumult, riot, and breach of the peace existed in the Counties of Gregg, Upshur, Rusk, and Smith, in the State of Texas, and that imminent danger of insurrection, tumult, riot, and breach of the peace existed therein.

C. Subject to their Motions to Strike, Defendants deny that Executive Proclamation No. 8447, issued by R. S. Sterling, Governor of Texas, is a "purported" Proclamation.

Subject to their Motions to Strike, Defendants deny that the action of R. S. Sterling in issuing and promulgating Executive Proclamation No. 8447 exceeded the authority given by law to the Governor of Texas, and in this connection, Defendants say that said Proclamation No. 8447 was issued by R. S. Sterling in his capacity as Governor of the State of Texas, and in the exercise of the power vested in him by the Constitution and laws of the State of Texas and for the purpose of suppressing insurrection and preventing insurrection, tumult, riot, and breach of the peace in the [fol. 94] area designated in said Proclamation and within the territorial limits of the State of Texas.

D. Subject to their Motions to Strike, Defendants say that they are without knowledge of the facts alleged in Paragraph 17 of Plaintiffs' Petition, other than those facts herein specifically admitted or denied.

XVIII

A. Defendants move the Court to Strike from Paragraph 18, Line 2, of Plaintiffs' Petition, the word, "purportedly," because the same is a mere conclusion of the pleader based upon no averment of fact.

Defendants move the Court to Strike from Paragraph 18 of Plaintiffs' Petition the following language: "but in truth and in fact exceeding the authority vested in said officer" for the reason that the same is a mere conclusion of the pleader based upon no averment of fact.

B. Defendants admit that R. S. Sterling, Governor of Texas, declared Martial Law in the Counties of Gregg, Upshur, Rusk, and Smith, in the State of Texas, effective at 6 a. m. the 17th day of August, A. D. 1931, and directed Jacob F. Wolters to assume supreme command of the situation in the territory affected, and without delay to completely shut down every producing crude oil well and/or producing well of natural gas, and to further take such steps as he (Jacob F. Wolters) deemed necessary to enforce and uphold the majesty of the law, subject to the orders of R. S. Sterling, Governor of Texas.

[fol. 95] C. Subject to their Motions to Strike, Defendants deny that the acts of R. S. Sterling in issuing Executive Proclamation No. 8447, declaring Martial Law in the Counties of Gregg, Upshur, Rusk, and Smith, and issuing to Jacob F. Wolters the orders and directions set out in Paragraph 18 of Plaintiffs' Petition, in any way exceeded the authority vested in the Governor of Texas.

Subject to their Motions to Strike, Defendants deny that in issuing Proclamation No. 8447, declaring Martial Law in the Counties of Gregg, Upshur, Rusk, and Smith, in the State of Texas, and issuing to Jacob F. Wolters the orders set out in Paragraph 18 of Plaintiffs' Petition, R. S. Sterling was "purportedly" acting as the Governor of the State of Texas, and Defendants say that each of said acts was an act of the Governor of the State of Texas.

XIX

A. Defendants move the Court to Strike from Paragraph 19 of Plaintiffs' Petition each and every allegation therein contained, because said allegation, and each of them, are immaterial and irrelevant to any issue herein.

B. Subject to their Motion to Strike, Defendants say that they are without knowledge of the facts alleged in Paragraph 19 of Plaintiffs' Petition.

XX

A. Defendants move the Court to Strike from Paragraph 20 of Plaintiffs' Petition each and every allegation therein contained, because each and every allegation amounts to, and is, an attempt to impeach, controvert and deny the [fol. 96] existence of the insurrection declared by the Governor in Executive Proclamation No. 8447 to exist in the Counties of Gregg, Upshur, Rusk, and Smith, in the State of Texas.

B. Subject to their Motion to Strike, Defendants specifically deny each and every allegation contained in Paragraph 20 of Plaintiffs' Petition.

XXI

A. Defendants move the Court to Strike from Paragraph 21, Line 2, of Plaintiffs' Petition, the word, "purported," because the same is a mere conclusion of the pleader, unsupported by any averment of fact.

Defendants move the Court to Strike from Paragraph 21 of Plaintiffs' Petition the allegation that "in which again the members of the conspiracy, combination, and agreement to limit the production of oil, jointly and by agreement, divided expenses and provided testimony, all for the purposes and considerations of the said combination, conspiracy, and agreement," because the same is too vague and indefinite to advise Defendants, or the Court, as to who are alleged to have committed the acts therein set out.

Defendants move the Court to Strike from Paragraph 21 of Plaintiffs' Petition each and every allegation therein contained, because each and every allegation is a mere conclusion of the pleader, unsupported by any averment of fact and is immaterial and irrelevant to any issue herein.

B. Subject to their Motions to Strike, Defendants say that they are without knowledge of the facts alleged in [fol. 97] Paragraph 21 of Plaintiffs' Petition, and in this connection Defendants say that if any such conspiracy existed as alleged by Plaintiffs, none of these Defendants had knowledge thereof, or was, or is a party thereto.

XXII

A. Defendants move the Court to Strike from Paragraph 22 of Plaintiffs' Petition each and every allegation therein contained, because each and every allegation is immaterial and irrelevant to any issue herein.

B. Subject to their Motion to Strike, Defendants deny that R. S. Sterling, immediately after the announcement of the Railroad Commission of Texas alleged in Paragraph 21 of Plaintiffs' Petition, or at any other time publicly announced, refused to permit the enforcement of the Order described in Paragraph 21 of Plaintiffs' Petition.

Subject to their Motion to Strike, Defendants deny that the Railroad Commission of Texas has been at any time under the domination and control of R. S. Sterling.

Subject to their Motion to Strike, Defendants deny that the Order of the Railroad Commission, referred to in Paragraphs 21 and 22 of Plaintiffs' Petition, was arbitrary, capricious, or unjust to any person, or in utter destruction of any rights of property, and of all admissible and competent testimony before the Railroad Commission of Texas.

C. Subject to their Motion to Strike, Defendants say that they are without knowledge of the facts alleged in Para- [fol. 98] graph 22 of Plaintiffs' Petition except those facts herein specifically denied.

XXIII

A. Defendants move the Court to Strike from Paragraph 23 of Plaintiffs' Petition each and every allegation therein contained for the reason that each and every allegation is immaterial and irrelevant to any issue herein.

B. Subject to their Motion to Strike, Defendants deny that R. S. Sterling at any time participated in the alleged "conspiracy, combination, and agreement," referred to in

Paragraph 23 of Plaintiffs' Petition, and deny that R. S. Sterling in any way, or at any time, participated in any way in said alleged conspiracy, combination, and agreement, if any there was.

Defendants deny that R. S. Sterling did or performed any of the acts alleged to have been done by the members of said alleged conspiracy, combination, and agreement.

C. Subject to their Motion to Strike, Defendants say that they are without knowledge of the facts alleged in Paragraph 23 of Plaintiffs' Petition except those facts herein specifically denied.

XXIV

Defendants deny each and every allegation contained in Paragraph 24 of Plaintiffs' Petition.

XXV

A. Defendants move the Court to Strike from Paragraph 25 of Plaintiffs' Petition each and every allegation therein contained, because each and every allegation is immaterial [fol. 99] and irrelevant to any issue herein.

B. Subject to their Motion to Strike, Defendants admit that the "statement of the Governor's and the Regulatory Commission of the Mid-Continent States" was signed in the office of R. S. Sterling by Hon. Cullen F. Thomas, of Dallas, Texas, and by other persons.

C. Subject to their Motion to Strike, Defendants say that they are without knowledge of the facts alleged in Paragraph 25 of Plaintiffs' Petition except those facts herein specifically admitted, and in this connection Defendants say that the signing of the statement referred to in Paragraph 25 of Plaintiffs' Petition was no part or parcel of any conspiracy, but was a declaration of policy on the part of the signatory states, with respect to the preservation and conservation of a natural resource common to said states.

XXVI

A. Defendants move the Court to Strike from Paragraph 26 of Plaintiffs' Petition each and every allegation therein contained, because each and every allegation is a mere con-

clusion of the pleader based upon no averment of fact and is immaterial and irrelevant to any issue herein.

B. Subject to their Motion to Strike, Defendants deny that the "statement of the Governor's and the Regulatory Commission of the Mid-Continent States," referred to in Paragraph 26 and set out in Paragraph 25 of Plaintiffs' [fol. 100] Petition, "evidenced a purpose of absolutely restricting the oil production as therein outlined."

Subject to their Motion to Strike, Defendants deny that said "statement of the Governor's and the Regulatory Commission of the Mid-Continent States" was "an agreement on the part of" R. S. Sterling "and the members of the Railroad Commission of Texas to use the powers and discretions (if any) purportedly at their disposal for the purpose of accomplishing the advancement of the price of crude oil," and in this connection Defendants say that the signing of said statement, set out in Paragraph 25 of Plaintiffs' Petition and referred to in Paragraph 26 of said Petition, was a declaration of policy on the part of the signatory states, with respect to the preservation and conservation of a natural resource common to said states.

XXVII

A. Defendants move the Court to Strike from Paragraph 27 of Plaintiffs' Petition each and every allegation therein contained, because each and every allegation is a conclusion of the pleader based upon no avermentof fact and is immaterial and irrelevant to any issue herein.

B. Subject to their Motion to Strike, Defendants are without knowledge of any fact alleged in Paragraph 27 of Plaintiffs' Petition, and in this connection Defendants say that none of these Defendants was a part to the acts set out in said Paragraph 27.

[fol. 101] XXVIII

A. Defendants move the Court to Strike from Paragraph 28 of Plaintiffs' Petition each and every allegation therein contained, because each and every allegation is a conclusion of the pleader based upon no averment of fact and is immaterial and irrelevant to any issue herein.

B. Subject to their Motion to Strike, Defendants say that they are without knowledge of any facts alleged in Paragraph 28 of Plaintiffs' Petition, and in this connection Defendants say that none of them in any way participated in the act set out in said Paragraph 28 of Plaintiffs' Petition.

XXIX

A. Defendants move the Court to Strike from Paragraph 29, Line 2, of Plaintiffs' Petition, the word "purported," for the reason that said language expresses a mere conclusion of the pleader based upon no averment of fact.

B. Defendants admit that R. S. Sterling and Jacob F. Wolters commanded and directed the enforcement by the militia of the State of Texas of the Order of the Railroad Commission, dated September 2, 1931, and that said Order was so enforced by the militia of the State of Texas.

C. Defendants deny that they commanded and directed said enforcement of said Order and/or that said Order was enforced in accordance with the alleged plan and intention to limit and restrict the production of crude oil and petroleum in the United States and in the East Texas Oil Field for the purpose of affecting the price to be received therefor, and in this connection Defendants say that their [fol. 102] acts in enforcing said Order were performed in the belief that said Order was valid; that its enforcement was a part of their respective official duties and necessary to uphold the majesty of the law in the Military District of Gregg, Upshur, Rusk, and Smith Counties, in the State of Texas; and further, that the enforcement of said Order was necessary in the suppression of insurrection in said Military District and to prevent insurrection, tumult, riot, and general disorder therein; and that these Defendants, and especially the Defendant, R. S. Sterling, Governor of Texas, so believed, and accordingly enforced said Order until the enforcement thereof was restrained by this Honorable Court, and not thereafter.

XXX

A. Defendants move the Court to Strike from Paragraph 30 of Plaintiffs' Petition each and every allegation therein contained, save and except the allegation that on or about

October 10, 1931, the Railroad Commission of Texas issued an Order, reducing the per well allowable in the East Texas Oil Field to a total daily production of 165 barrels per day, because each and every allegation, other than the allegation above set out, is a mere conclusion of the pleader based upon no averment of fact and is immaterial and irrelevant to any issue herein.

B. Defendants admit that on October 10, 1931, the Railroad Commission of Texas issued an Order, reducing the per well allowable in the East Texas Oil Field to a total daily production of 165 barrels per day.

C. Subject to their Motion to Strike, Defendants say that they are without knowledge of the facts alleged in Para- [fol. 103] graph 30 of Plaintiffs' Petition except the fact herein specifically admitted.

XXXI

A. Defendants move the Court to Strike from Paragraph 31 of Plaintiffs' Petition each and every allegation therein contained, save and except the allegation that R. S. Sterling and Jacob F. Wolters from October 10, 1931, until October 13, 1931, compelled Complainants to restrict the output of crude oil from their wells, as set out in the Order of the Railroad Commission, dated October 10, 1931, because each of said allegations, save and except the allegation hereinabove set out, is a conclusion of the pleader based upon no averment of fact and is immaterial and irrelevant to any issue herein.

B. Defendants admit that R. S. Sterling and Jacob F. Wolters from October 10, 1931, to October 13, 1931, enforced and caused to be enforced the Order of the Railroad Commission, dated October 10, 1931, and in accordance therewith compelled Plaintiffs to restrict the output of crude oil from their wells to 165 barrels per day, as required by said Order.

C. Subject to their Motion to Strike, Defendants deny that their acts in enforcing the Order of the Railroad Commission, dated October 10, 1931, were in pursuance of any plan or scheme or for the purpose of affecting the price to be received for crude oil.

Subject to their Motion to Strike, Defendants deny that said Order of the Railroad Commission, dated October 10, 1931, and/or its enforcement by Defendants, or any of [fol. 104] them, was arbitrary, capricious, unjust, or without foundation in fact or in law, or contrary to the laws and Constitution, either of the State of Texas or of the United States, and in this connection Defendants say that said Order was enforced by these Defendants because these Defendants believed same to be a valid order; and further, because the enforcement of said Order was necessary in the suppression of insurrection in the Military District of Gregg, Upshur, Rusk, and Smith Counties and to prevent insurrection, tumult, riot, breach of the peace, and general disorder therein, and that these Defendants, and especially the Defendant R. S. Sterling, Governor of Texas, so believed.

XXXII

A. Defendants move the Court to Strike from Paragraph 32, Lines 7, 8, 9, 10, and 11, of Plaintiffs' Petition the following language: "said temporary Restraining Order was granted for the purpose and to the effect of preventing the interference with the operation of these Complainants' wells in the production of oil therefrom to the extent of 5,000 barrels per day," because the same expresses a mere conclusion of the pleader based upon no averment of fact and is immaterial and irrelevant to any issue herein.

Defendants move the Court to Strike from Paragraph 32 of Plaintiff's Petition, Line 20 and 21, the following language: "for the purpose of limiting and restricting the output of crude oil and thereby affecting the price thereof," because said language is a mere conclusion of the pleader based upon no averment of fact and is immaterial and irrelevant to any issue herein.

[fol. 105] B. Defendants admit that on the 13th day of October, 1931, the Original Petition in this cause was filed, as alleged in Paragraph 32 of Plaintiffs' Petition, and that this Court entered a Restraining Order therein, and in this connection Defendants say that none of them, since the issuance of said Restraining Order, has violated, disobeyed, or disregarded the same in any way, but that from the

time they were informed that said Order had been issued each of these Defendants has obeyed said Order.

C. Subject to their Motions to Strike, Defendants say that they are without knowledge of the facts alleged in Paragraph 32 of Plaintiffs' Petition, other than the facts herein specifically admitted.

XXXIII

Defendants admit that Jacob F. Wolters issued on the 13th day of October, 1931, General Order No. 15, as alleged and set out in Paragraph 33 of Plaintiffs' Petition and in this connection Defendants say that said act of Jacob F. Wolters was performed in obedience to the specific command of R. S. Sterling, Governor of Texas, Commander-in-Chief of the Military Forces of the State of Texas, his superior and commanding officer.

XXXIV

A. Defendants move the Court to Strike from Paragraph 34, Line 4, of Plaintiffs' Petition the following language: "unlawfully and without authority," because the same is a mere conclusion of the pleader not based upon any averment of fact.

B. Defendants admit that Jacob F. Wolters on October 13, 1931, commanded and ordered those under his command [fol. 106] to proceed to the properties of these Complainants and completely shut down all production from the wells thereon and to cause same to remain shut down until such time as the total amount of oil produced in excess of 165 barrels per day for the number of days said wells should be shut down, and thereafter to permit no greater production than 165 barrels per day, and that the wells were so shut down; and in this connection Defendants say that said acts of Jacob F. Wolters were performed under oral and written orders given by R. S. Sterling, Governor of Texas, and Commander-in-Chief of the Military Forces of the State of Texas, his superior and commanding officer.

C. Subject to their Motion to strike, Defendants deny that the acts of Jacob F. Wolters, hereinabove set out, were unlawful or without authority, and that said orders were issued and executed because the same were necessary in

the suppression of insurrection in the Military District of Gregg, Upshur, Rusk, and Smith Counties and to prevent insurrection, tumult, riot, breach of the peace, and general disorder therein, and that these Defendants, and especially the Defendant R. S. Sterling, Governor of Texas, so believed.

XXXV

Dfendants admit each and every allegation contained in Paragraph 35 of Plaintiffs' Petition.

XXXVI

A. Defendants move the Court to Strike from Paragraph 36 of Plaintiffs' Petition the following language: "without any action on the part of the Railroad Commis- [fol. 107] sion, without any hearing or notice, or opportunity to be heard," because the same is immaterial and irrelevant to any issue herein.

Defendants move the Court to Strike from Paragraph 36 of Plaintiffs' Petition the following language: "without any authority or justification or excuse other than the agreements herein outlined, and to restrict the production of crude oil and to affect the price to be received therefor," because the same is a mere conclusion of the pleader based upon no averment of fact and is immaterial and irrelevant to any issue herein.

Defendants move the Court to Strike from Paragraph 36 of Plaintiffs' Petition the following language: "in this connection your Complainants allege that the total production from the East Texas Oil Field, by reason that completion of new wells had again exceeded the total sum of 400,000 barrels per day, and that therein and thereby the total production from the State of Texas was made to exceed considerably more than the sum of 902,000 barrels per day," because the same is immaterial and irrelevant to any issue herein.

B. Defendants admit that on or about the 28th day of October, 1931, R. S. Sterling, Governor of Texas, issued to Jacob F. Wolters, Commanding Officer of the Military District of Gregg, Upshur, Rusk, and Smith Counties in the State of Texas, an Order commanding and directing Jacob F. Wolters to limit the production of oil within said Mili-

tary District to 150 barrels per well per day, and that Jacob F. Wolters enforced and carried out said Order; and in this connection Defendants say that the acts of Jacob F. Wolters were performed under oral and written [fol. 108] orders of R. S. Sterling, Governor of Texas and Commander-in-Chief of the Military Forces of the State of Texas, his superior and commanding officer; and that the issuance and execution of said orders was necessary in the suppression of insurrection and to prevent insurrection, tumult, riot, breach of the peace, and general disorder in the Military District of Gregg, Upshur, Rusk, and Smith Counties; and that these Defendants, especially the Defendant R. S. Sterling, Governor of Texas, so believed.

C. Subject to their Motions to Strike, Defendants deny that the issuance and enforcement of said Order of R. S. Sterling, Governor of Texas, was without any authority or justification or excuse.

Subject to their Motions to Strike, Defendants deny that the issuance and enforcement of said Order of R. S. Sterling, Governor of Texas, had anything to do with the alleged agreement said to be outlined in Plaintiffs' Petition and deny that the issuance and enforcement of said Order was to restrict the production of crude oil and to affect the price to be received therefor.

D. Subject to their Motions to Strike, Defendants say that they are without knowledge of the facts alleged in Paragraph 36 of Plaintiffs' Petition other than the facts herein specifically admitted or denied.

XXXVII

A. Defendants admit that the orders of the Railroad Commission, described in Plaintiffs' Petition, by their own terms expired as of the 31st day of October, 1931.

Defendants admit that from and after October 13, 1931, [fol. 109] the Railroad Commission had neither exercised nor attempted to exercise any supervision over the amount of oil to be produced by wells located in the Military District of Gregg, Upshur, Rusk, and Smith Counties.

Defendants admit that R. S. Sterling, Governor of Texas, and Jacob F. Wolters, acting under the command of R. S. Sterling, have since October 31, 1931, restricted the production from all oil wells in the Military District of Gregg,

Upshur, Rusk, and Smith Counties; and in this connection Defendants say that the acts performed by Jacob F. Wolters were performed by him under oral and written orders issued to him by R. S. Sterling, Governor of Texas and Commander-in-Chief of the Military Forces of the State of Texas, his superior and commanding officer; and that the issuance and execution of the said orders was necessary in the suppression of insurrection and to prevent insurrection, tumult, riot, breach of the peace, and general disorder in the Military District of Gregg, Upshur, Rusk, and Smith Counties; and that these Defendants, and especially the Defendant, R. S. Sterling, Governor of Texas, so believed.

B. Defendants are without knowledge of the facts alleged in Paragraph 37 of Plaintiffs' Petition other than those herein specifically admitted.

XXXVIII

A. Defendants move the Court to Strike from Paragraph 38 of Plaintiffs' Petition the following language: "that on November 7 the total production from the East [fol 130] Texas Field again exceeded the sum of 902,000 barrels and was daily increasing above such figures," for the reason that the same is immaterial and irrelevant to any issue herein.

Defendants move the Court to Strike from Paragraph 38 of Plaintiffs' Petition the following language: "and because of such fact and in accordance with the purpose, plan and design to restrict and limit the production of crude oil in the United States and in said particular area and without any right or authority," for the reason that the same is a mere conclusion of the pleader based upon an averment of fact and is immaterial and irrelevant to any issue herein.

Defendants move the Court to Strike from Paragraph 38 of Plaintiffs' Petition the following language: "or any order or hearing or notice of any such hearing by and before the Railroad Commission of Texas or before the Respondents," because the same is immaterial and irrelevant to any issue herein.

B. Defendants admit that R. S. Sterling, Governor of Texas, on or about November 7, 1931, issued an order to

Jacob F. Wolters, Commanding Officer of the Military District of Gregg, Upshur, Rusk, and Smith Counties, to limit the production of oil from all wells located in the aforesaid Military District to 105 barrels per well per day, and that this Order was executed by Jacob F. Wolters; and in this connection Defendants say that the acts performed by Jacob F. Wolters were performed by him under oral and written orders, issued to him by R. S. Sterling, Governor of Texas and Commander-in-Chief of the Military Forces of the State of Texas, his superior and commanding officer; and that the issuance and execution of the said [fol. 111] orders was necessary in the suppression of insurrection and to prevent insurrection, tumult, riot, breach of the peace, and general disorder in the Military District of Gregg, Upshur, Rusk, and Smith Counties; and that these Defendants, and especially the Defendant R. S. Sterling, Governor of Texas, so believed.

C. Defendants deny that the order described in Paragraph 38 of Plaintiffs' Petition is either arbitrary or capricious or unjust to Plaintiffs, or without foundation in fact or in law or contrary either to the Constitution of the State of Texas or the Constitution of the United States.

D. Subject to their Motions to Strike, Defendants deny that the issuance of the Order described in Paragraph 38 of Plaintiffs' Petition, or the execution thereof, was because, or in accordance with any purpose, plan, or design referred to in Plaintiffs' Petition as a conspiracy to restrict the production of crude oil in the United States and/or to affect the price to be received therefor.

Defendants deny that the issuance and/or the execution of the Order described in Paragraph 38 of Plaintiffs' Petition is arbitrary or capricious or unjust to Plaintiffs herein or any person, and deny that the issuance and execution of said Order is without foundation in fact or in law or contrary either to the Constitution of the State of Texas or the Constitution of the United States.

E. Subject to their Motions to Strike, Defendants say that they are without knowledge of the facts alleged in [fol. 112] Paragraph 38 of Plaintiffs' Petition except those facts herein specifically admitted or denied.

XXXIX

Defendants deny each and every allegation contained in Paragraph 39 of Plaintiffs' Petition.

XL

Defendants deny each and every allegation contained in Paragraph 40 of Plaintiffs' Petition.

XLI

Defendants deny that it was their intention, or the intention of any of them, by their joint acts, to raise the price paid for crude oil.

XLII

Defendants deny each and every allegation contained in Paragraph 42 of Plaintiffs' Petition.

XLIII

A. Defendants move the Court to Strike from Paragraph 43 of Plaintiffs' Petition the language contained in Lines 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13, because said language is immaterial and irrelevant to any issue herein.

B. Defendants deny each and every allegation contained in Paragraph 43 of Plaintiffs' Petition.

XLIV

A. Defendants move the Court to Strike from Paragraph 44 of Plaintiffs' Petition each and every allegation therein contained, because each and every allegation is im-
[fol. 113] material and irrelevant to any issue herein.

B. Subject to their Motion to Strike, Defendants deny each and every allegation contained in Paragraph 44 of Plaintiffs' Petition.

XLV

A. Defendants admit that House Bill No. 25 provides the penalties described in Paragraph 45 of Plaintiffs' Petition.

B. Defendants are without knowledge of the facts alleged in Paragraph 45 of Plaintiffs' Petition, other than the fact herein specifically admitted.

XLVI

Answering now in the affirmative, Defendants respectfully represent and show to the Court the following:

A

On August 16, 1931, the Defendant, Hon. R. S. Sterling, Governor of the State of Texas, by Executive Proclamation No. 8447, a true copy of which proclamation is hereto attached, marked Exhibit "A," and expressly made a part hereof to the same extent and effect as if herein copied in haec verba, declared the Counties of Gregg, Upshur, Rusk, and Smith, in the State of Texas, to be in a state of insurrection, riot, tumult, and breach of the peace, and declared Martial Law in said Counties of Gregg, Upshur, Rusk, and Smith, effective at 6 A. M., August 17, 1931, and directed the Defendant Jacob F. Wolters, as Brigadier General of the Texas National Guard, to assume supreme [fol. 114] command of the situation in said counties and to take such steps as he, the said Jacob F. Wolters, might deem necessary in order to enforce and uphold the majesty of the law; and in this connection Defendants say that the Defendant R. S. Sterling, Governor of Texas, did on August 16, 1931, believe that a state of insurrection, tumult, riot, and breach of the peace then existed in the said Counties of Gregg, Upshur, Rusk, and Smith, in the State of Texas; and that imminent danger of insurrection, tumult, riot, and breach of the peace existed in said Counties; and that in order to suppress said insurrection, tumult, riot, and breach of the peace in said Counties and to prevent insurrection, tumult, riot, and breach of the peace therein, he was required under the Constitution and laws of the State of Texas, and it was necessary for him as Governor of Texas to declare Martial Law in said Counties and to enforce and uphold the majesty of the law therein with the militia of the State of Texas; and each of said acts was so required and so necessary.

B

On August 17, 1931, the Defendant, Jacob F. Wolters, with officers and enlisted men of the State of Texas, subject to his orders, did pursuant to the command of the Governor of the State of Texas assume supreme command of

the situation in the Military District of Gregg, Upshur, Rusk, and Smith Counties, in the State of Texas, and has continuously since said date been, and now is, Commanding [fol. 115] Officer of said Military District, and has been ever since, and now is, actively engaged in enforcing and upholding the majesty of the law therein; and that at all times since said date Martial Law has been and now is in full force and effect in said Military District.

C

The property and the oil wells described in Plaintiffs' Amended Bill of Complaint are located and situated within the aforesaid Military District.

D

That from and after 6 A. M. on the 17th day of August, 1931, the Defendant, Jacob F. Wolters, Commanding Officer of the Military District hereinabove described, enforced all orders of the Governor of Texas, with respect to oil production in said Military District, and as commanded by R. S. Sterling, Governor of Texas and Commander-in-Chief of the Military Forces of the State of Texas, his superior and commanding officer, he enforced all orders of the Railroad Commission of Texas, limiting the production of oil in said Military District, including the orders of said Commission, dated September 2, 1931, September 18, 1931, and October 10, 1931.

E

That on October 13, 1931, upon learning of the temporary Restraining Order issued on or about that date by this Honorable Court, enjoining and restraining him and others from enforcing certain orders of the Railroad [fol. 116] Commission of Texas, the Defendant, Jacob F. Wolters, ceased to enforce any order of the Railroad Commission of Texas, limiting the production of oil in the East Texas Field in so far as Complainants' properties and/or wells are concerned; and that none of these Defendants since learning of said temporary Restraining Order have enforced, or attempted to enforce, any of said orders of the Railroad Commission with respect to Complainants' properties and/or wells; and that none of these

Defendants now intend to enforce any of said orders of the Railroad Commission of Texas, which have in truth and in effect long since expired by their own terms.

F

Upon October 13, 1931, upon being informed by Defendant Jacob F. Wolters that the orders of the Railroad Commission of Texas, limiting the production of oil in the Military District hereinabove described, could no longer be enforced in so far as they affected the properties and/or wells of Plaintiffs herein, the Defendant R. S. Sterling, Governor of Texas, issued oral and written orders to the Defendant Jacob F. Wolters, Commanding Officer of said Military District, to limit the production of oil in said Military District to 165 barrels per well per day. The Defendant Jacob F. Wolters accordingly limited the production of oil within said Military District to 165 barrels per well per day in compliance with these orders issued to him by R. S. Sterling, Governor of Texas and Commander-in-Chief of the Military Forces of the State of Texas, his superior and commanding officer.

[fol. 117] In this connection, Defendants aver that on said date and thereafter the limitation of the production of oil in said Military District to 165 barrels per well per day was necessary in the suppression of insurrection, tumult, riot, and breach of the peace in said Military District and to prevent insurrection, tumult, riot, breach of the peace, and general disorder therein; and that these Defendants, and especially the Defendant R. S. Sterling, Governor of Texas, so believed.

G

On or about the 28th day of October, 1931, the Defendant, R. S. Sterling, issued oral and written orders to the defendant Jacob F. Wolters, commanding officer of said Military District, to limit the production of oil in said Military District to 150 barrels per well per day. The Defendant Jacob F. Wolters accordingly limited the production of oil within said Military District to 150 barrels per well per day in compliance with these orders issued to him by R. S. Sterling, Governor of Texas and Commander-in-Chief of the Military Forces of the State of Texas, his superior and commanding officer.

In this connection Defendants aver that on said date and thereafter the limitation of the production of oil in said Military District to 150 barrels per well per day was necessary in the supression of insurrection, tumult, riot, and breach of the peace in said Military District and to prevent insurrection, tumult, riot, breach of the peace, and general disorder therein; and that these Defendants, and especially the Defendant R. S. Sterling, Governor of Texas, [fol. 118] so believed. A true and correct copy of the Order hereinabove described is hereto attached, marked Exhibit "B," and expressly made a part hereof to the same extent and effect as if herein copied in hæc verba.

H

On or about November 6, 1931, the Defendant R. S. Sterling issued oral and written orders to the Defendant Jacob F. Wolters, Commanding Officer of said Military District, to limit the production of oil in said Military District to 125 barrels per well per day. The Defendant Jacob F. Wolters accordingly limited the production of oil within said Military District to 125 barrels per well per day in compliance with these orders issued to him by R. S. Sterling, Governor of Texas and Commander-in-Chief of the Military Forces of the State of Texas, his superior and commanding officer.

In this connection Defendants aver that on said date and thereafter the limitation of the production of oil in said Military District to 125 barrels per well per day was, and now is, necessary in the suppression of insurrection, tumult, riot, and breach of the peace in said Military District and to prevent insurrection, tumult, riot, breach of the peace, and general disorder therein; and that these Defendants, and especially the Defendant R. S. Sterling, Governor of Texas, so believed, and believes. A true and correct copy of the Order hereinabove described is hereto attached, marked Exhibit "C," and expressly made a part hereof to the same extent and effect as if herein copied in hæc verba.

[fol. 119] I

Defendants now say to the Court in all sincerity that the Defendant R. S. Sterling, as Governor of Texas, its

Chief Civil Magistrate and Commander-in-Chief of its Military Forces, is charged by the Constitution and laws of the State of Texas with the duty to cause the laws of said State to be faithfully executed; and that to that end he is authorized by the Constitution and laws of the State of Texas to employ the Military Forces of said State.

Defendants show that pursuant to his said duty, Defendant R. S. Sterling, in the capacity aforesaid, has and had prior to August 16, 1931, investigated to the best of his ability the conditions in what is known as the East Texas Oil Field in the Counties of Gregg, Upshur, Rusk, and Smith, within the territorial limits of the State of Texas, and has found those facts to be as follows:

That underlying the said Counties of Gregg, Upshur, Rusk, and Smith, in the State of Texas, and composing what is known as the East Texas Oil Field, there exists a body of crude petroleum oil of tremendous proportions, which has been estimated and is believed to be capable of producing, temporarily at least, 14,000,000 barrels of oil per day.

That the citizens of Texas, residents of said Counties, who were and are property owners therein had and have a potential financial interest in that portion of oil underlying property owned by them; and that the financial re- [fol. 120] turn to said citizens is contingent upon and will be proportionate to the recovery of a maximum amount of said oil underlying their said properties and from mineral leases in which said citizens have acquired interests, or from which they are entitled to receive royalties.

That the amount of financial return, if any, to be received by said citizens is further contingent upon the market price of crude petroleum oil.

That the price of crude petroleum oil in the Counties of Gregg, Upshur, Rusk, and Smith, in the State of Texas, on August 17, 1931, was from five cents to fifteen cents per barrel, less a gathering charge of approximately five cents per barrel.

That by reason of the inadequacy of the laws of Texas with reference to the production of petroleum to regulate and control the development of the East Texas Oil Field; and further, by reason of the tremendous proportions and potential production of said East Texas Oil Field; and

further by reason of reckless and hazardous operation by irresponsible operators, the drilling of and production in said East Texas Oil Field, had prior to August 17, 1931, proceeded in a disorderly and haphazard manner.

That prior to that time an overwhelming majority of the citizens of said Counties believed, and now believe, that said disorderly and haphazard operation of said field was an actual and present menace to the ultimate recovery of a maximum of the oil underlying said Counties, and seriously and presently threatened to destroy the possibility [fol. 121] of the ultimate recovery of a substantial portion of said oil.

That prior to August 17, 1931, an overwhelming majority of the citizens of said Counties believed, and now believe, that said reckless, disorderly, and haphazard operation of the field was in great part responsible for the low price of crude oil hereinabove set out.

That the confusion and unsettled condition brought about and caused by such operation of the field had been utilized by certain unscrupulous operators as an opportunity to avoid payment to the citizens of the Counties aforesaid of royalties to which said citizens were justly entitled.

That by reason of their belief, which these Defendants say was well grounded and which these Defendants believe to be true, the citizens of Gregg, Upshur, Rusk, and Smith Counties were determined that the conditions above described must cease to exist; and that many of said citizens were prepared and intended to resort to force and arms to accomplish this end, in the event that it should not be brought about by the duly constituted authorities of the State of Texas, which attempt would have been instantly and violently joined in by anti-social and lawless individuals then present in said Counties.

That it was widely stated and a matter of common knowledge that unless the above described situation should be altered by the duly constituted authorities of the State, dynamite and fire would be employed in an attempt to halt the reckless and disorderly operation of the field, and [fol. 122] that there was a reasonable probability that this would come about.

Defendant R. S. Sterling, Governor of Texas, on the 16th day of August, 1931, was acquainted with the condition hereinabove described and knew that said condition

existed in said Counties. He further knew that many of the oil operators in said Counties were secretly and openly defying, disregarding, and setting at naught the conservation laws of the State of Texas and the orders of the Railroad Commission of Texas entered thereunder; and that said laws and orders, even if enforced to their fullest extent, would not and could not restore the Counties of Gregg, Upshur, Rusk, and Smith to a state of tranquility, or prevent the danger which was imminent of insurrection, tumult, riot, breach of the peace, and general disorder therein.

Accordingly and basing his decision upon the foregoing facts, and for the purpose of suppressing the then existing state of insurrection, tumult, riot, and breach of the peace, and preventing insurrection, riot, tumult, and breach of the peace, which were imminent in the said Counties, the Defendant R. S. Sterling as Governor of Texas issued his Proclamation No. 8447 hereinabove described and attached hereto, and declared Martial Law in the Counties of Gregg, Upshur, Rusk, and Smith, as hereinabove alleged.

J

The Defendant R. S. Sterling then believed that the emergency, requiring the enforcement of Martial Law in said Counties would endure only for a brief space of time; it being his belief that adequate laws and proper orders issued thereunder would speedily be contrived, and being [fol. 123] promptly and efficiently enforced would make it possible for him to lift Martial Law from the affected area with assurance that said area would remain orderly and tranquil, and that there would be no further insurrection, tumult, riot, or breach of the peace therein.

This, however, has not come about. On or about the October 13th day of August, 1931, this Honorable Court issued a temporary restraining order, restraining the Railroad Commission of Texas from enforcing its Order, limiting the production of oil in the East Texas Oil Field to 185 barrels per well per day in so far as the properties and/or wells of the Plaintiffs herein were concerned, and restraining other named parties, including the Defendants, Jacob F. Wolters and W. W. Sterling, from so en-

forcing said Order. The effect of this Restraining Order was to paralyze the efforts of the Railroad Commission and of the Defendants, Wolters and W. W. Sterling, in so far as said Wolters and Sterling, or either of them, were enforcing said Order of the Railroad Commission to restrict, or limit, the production of oil in the East Texas Oil Field.

The effect of this enforced inability of the State Authority, charged under the Constitution and laws of Texas with the duty and authority to regulate the production and insure the conservation of natural resources in this State, and the similar inability of the Defendants, Wolters and W. W. Sterling, to assist the Railroad Commission of Texas to that end, created an extraordinary emergency. [fol. 124] The people of Gregg, Upshur, Rusk, and Smith Counties became excited, alarmed, and inclined to take the law into their own hands. Defendants, and especially the defendants Jacob F. Wolters and R. S. Sterling, were informed and believed, and now believe, that if the East Texas Oil Field were permitted to produce in excess of 400,000 barrels of oil per day, or if any particular well, including especially the wells of Plaintiffs, were permitted to produce an amount of oil running into thousands of barrels per day, the people of Gregg, Upshur, Rusk, and Smith Counties would consider that the East Texas Oil Field was being operated and exploited in a manner calculated to prejudice seriously the ultimate recovery of large quantities of oil in which the citizens of said Counties had and have a financial interest, contingent upon and proportionate to the ultimate recovery of a maximum amount thereof. Defendants were informed and believed, and now believe, that the citizens of said Counties did further believe that the production in the East Texas Oil Field of an amount of oil greater than 400,000 barrels per day, or if any particular well, including especially the wells of Plaintiffs, were permitted to produce an amount of oil running into thousands of barrels per day, would cause the price of oil to drop forthwith from its then figure of 68 cents per barrel, less a gathering charge of approximately five cents per barrel, to a price of 15 cents or less per barrel, or at least to fall to a very low figure, to the financial detriment of those citizens owning lands, leases, or royalties in said Counties of Gregg, Upshur, Rusk, and

[fol. 125] Smith. Defendants were informed and believed, and now believe, that by reason of their belief, which these Defendants consider to have been correct, the citizens of said Counties would take the law into their own hands; that dynamite and fire would be utilized in a desperate attempt to prevent the production of oil in said Counties, with the probability of great loss of property and the possibility of the loss of human life; and that the general disorder necessarily contingent upon such acts would have been instantly and violently increased by lawless and anti-social individuals, then present in said Counties.

Being informed and believing as aforesaid, the Defendant R. S. Sterling, as Governor of Texas, in order to prevent the conditions hereinabove described, issued his Order to Jacob F. Wolters, Commanding Officer of the Military District above described, to limit the production of oil in said District to 165 barrels per well per day, and said Order was executed by the Defendant, Jacob F. Wolters, as the Order and command of R. S. Sterling, Governor of Texas and Commander-in-Chief of its Military Forces, his superior and commanding officer.

K

For the same reasons set out in the preceding Paragraph J, the Defendant, R. S. Sterling, Governor of Texas, issued an Order on or about October 26, 1931, limiting the production of oil in the Military District above described to 150 barrels per well per day, and on or about November 7, 1931, issued an Order, restricting the said production of oil in [fol. 126] said Military District to 125 barrels per well per day, and each of said Orders was executed and enforced by the Defendant, Jacob F. Wolters, as the Order of R. S. Sterling, Governor of Texas and Commander-in-Chief of the Military Forces, his superior and commanding officer, and said Order is now being enforced for said reason set out in Paragraph J.

L

None of the Orders issued by the Defendant, R. S. Sterling, and enforced by the Defendant, Jacob F. Wolters, as hereinabove set out, since the issuance of the aforesaid temporary Restraining Order by this Honorable Court (and

this statement specifically includes the Orders of October 13, 1931, October 29, 1931, and November 7, 1931) were issued in order to enforce, or cause to be enforced, any order of the Railroad Commission of Texas, but for the sole and only purpose of suppressing and preventing insurrection, tumult, riot, breach of the peace, and general disorder as aforesaid. In this connection, Defendants Jacob F. Wolters and W. W. Sterling, especially represent and show to the Court that in their opinion as Military Officers, said action was the only act competent to prevent insurrection, tumult, riot, breach of peace, and general disorder in the Military District; and that had such action not been taken, an army, exceeding in numbers the militia and peace officers of the State of Texas, would have been, and would now be insufficient to guard and protect the oil wells, tank farms, storage facilities, pipe lines, and other property located within the Military District from depredation and destruction; and that many of said properties would have [fol. 127] been, and would now be, attacked and destroyed; and that such attack and destruction, and the general disorder attendant thereupon would have constituted, and would now constitute, a menace to human life in said Military District.

M

It is the purpose and intention of the Defendant, R. S. Sterling, Governor of Texas, to enforce and administer Martial Law in the Counties of Gregg, Upshur, Rusk, and Smith, in the State of Texas, so long as he deems this necessary in order to suppress insurrection, tumult, riot, and breach of the peace in said Counties, and so long as he deems it necessary in order to prevent insurrection, tumult, riot, and breach of the peace therein, and so long as he deems it necessary in order to enforce and uphold in said Counties the majesty of the law; and that it is his further intention to lift Martial Law from said Counties as soon as it can safely be done with relation to the existing emergency therein.

N

Defendants say that each and every act alleged by Plaintiffs in their Petition to have been done and performed by the Defendants, Jacob F. Wolters and W. W. Sterling, or either of them, if done at all, was done and performed in

their respective official capacities as Brigadier General, Texas National Guard, commanding the Military District of Gregg, Upshur, Rusk, and Smith Counties, in the State of Texas; and as Adjutant General of the State of Texas, [fol. 128] respectively; and that every act so performed was performed during the existence of Martial Law and in the administration thereof, and in obedience to lawful orders given them by Defendant, R. S. Sterling, Governor of the State of Texas and Commander-in-Chief of its Military Forces, and their superior and commanding officer; and Defendants further say that every act so done by Defendants, Jacob F. Wolters and W. W. Sterling, was necessary to be done in the administration of Martial Law, and either to suppress insurrection, tumult, riot, and breach of the peace, or to prevent imminent insurrection, tumult, riot, and breach of the peace.

O

Defendants say that the Defendant, W. W. Sterling, is Adjutant General of the State of Texas, and that his only acts done in connection with the acts alleged by Plaintiffs, were acts necessary and required by law to be performed by him in transmitting orders issued by the Defendant, R. S. Sterling, as Governor of the State of Texas, to the Defendant, Jacob F. Wolters, as Brigadier General, Texas National Guard, commanding the Military District of Gregg, Upshur, Rusk, and Smith Counties, and in dispatching troops and Texas Rangers to the Military District and furnishing to said troops and rangers on duty within the aforesaid Military District necessary equipment and supplies and such other routine duties required of him by law as Adjutant General of the State of Texas.

[fol. 129] Wherefore these Defendants and each of them move the Court to dismiss Plaintiffs' First Amended Original Petition and Bill of Complaint herein, upon the following grounds:

1. It appears upon the face of said First Amended Original Petition and Bill of Complaint that this court is without jurisdiction to entertan this suit, because in so far as Plaintiffs seek injunctive relief against these Defendants, the suit is in substance and effect a suit against the State

of Texas for an injunction restraining and enjoining the state of Texas, its Governor, and other officials from doing and causing to be done, acts deemed by the Governor of Texas necessary to be done and ordered by him to be done to suppress and prevent insurrection, tumult, riot, and breach of the peace, and in the administration of Martial Law within the territorial limits of the State of Texas, and the State of Texas has not consented to be sued, or waived its immunity from suit.

2. It appears upon the face of said First Amended Original Petition and Bill of Complaint that this Court is without jurisdiction to entertain this suit in so far as Plaintiffs seek injunctive relief against these Defendants, or any of them, because the injunctive relief sought will restrain the Defendant, R. S. Sterling, Governor of the State of Texas, its Chief Civil Magistrate and Commander-in-Chief of the Military Forces of said State, from exercising discretion vested in him by the Constitution and Statutes of the State of Texas, as Governor of said State, its Chief Magistrate and Commander-in-Chief of its Military [fol. 130] Forces, in determining when and where an insurrection exists within said State, and in determining what means to employ in order to suppress said insurrection and prevent imminent insurrection, tumult, riot, and breach of the peace within the territorial limits of the State of Texas, and from administering Martial Law therein.

3. It does not appear from the averments of said First Amended Original Petition and Bill of Complaint that the orders issued and given by the Defendant, R. S. Sterling, Governor of the State of Texas, to the Defendant, Jacob F. Wolters, and challenged as unconstitutional, or in contravention of any designated provision of the Constitution of the State of Texas, or the United States of America.

4. The First Amended Original Petition and Bill of Complaint fails to state facts sufficient to constitute a cause of action in favor of Plaintiffs, or any of them, against these Defendants, or any of them.

5. The First Amended Original Petition and Bill of Complaint does not state facts to constitute a valid cause of action against these Defendants, or any of them either jointly or severally with the other Defendants herein.

6. The First Amended Original Petition and Bill of Complaint does not set forth facts sufficient to constitute a cause of action at law, or in equity, against these Defendants, or any of them.

7. It appears upon the face of the First Amended Original Petition and Bill of Complaint that Plaintiffs are not entitled to the relief prayed for in said Bill against these Defendants, or any of them, or to any relief against them, or [fol. 131] any of them, or to any relief against them, or any of them, upon the facts alleged in said First Amended Original Petition and Bill of Complaint.

8. It appears on the face of the First Amended Original Petition and Bill of Complaint that Plaintiffs are not entitled to the injunctive relief prayed for in said First Amended Original Petition and Bill of Complaint as against these Defendants, or any of them.

Wherefore Defendants R. S. Sterling, W. W. Sterling, and Jacob F. Wolters pray, first, that the whole of the First Amended Original Petition and Bill of Complaint may be dismissed, and that they may be hence dismissed with their costs in this behalf incurred; second, that in the event the whole of the First Amended Original Petition and Bill of Complaint be not dismissed, then that the portion of said Petition and Bill, which seeks injunctive relief against these Defendants, or any of them, be dismissed; and that these Defendants may be hence dismissed with their costs in this behalf incurred; and third, that in the event this motion to dismiss be overruled, refused, or denied, then and in that event these defendants R. S. Sterling, W. W. Sterling, and Jacob F. Wolters pray that the temporary injunction asked by Plaintiffs be refused and denied; and fourth, in the event that their motion to dismiss be overruled and denied them, and in that event, these Defendants, R. S. Sterling, W. W. Sterling, and Jacob F. Wolters, pray that upon final hearing of this cause all the injunctive relief asked against them, or any of them, be refused and denied; and further pray that the suit for damages be dismissed, [fols. 132 & 133] and in the event that it be not dismissed, that the same be abated until the termination of Martial Law; and these Defendants, and each of them, further pray

judgment for their costs and for such other and further relief as they and each of them may be entitled to receive.

(Signed) Dan Moody, (Signed) Paul D. Page, Jr., (Signed) E. F. Smith, Attorneys for the Defendants, R. S. Sterling, W. W. Sterling, and Jacob F. Wolters. Smith, Brownlee & Goldsmith, of Counsel.

Duly sworn to by R. S. Sterling et al. Jurats omitted in printing.

[fol. 134] EXHIBIT "A" TO ANSWER

Proclamation by the Governor of the State of Texas

No. 8447

To all to whom these presents shall come:

Whereas, Section 59-a Article 16 of the Constitution of the State of Texas declares that the preservation, conservation and development of all of the natual resources of this State are each and all public rights and duties; and

Whereas the Legislature in the Act effective August 12, 1931, declared the law of Texas to be: "Neither natural gas nor crude petroleum shall be produced, transported, stored or used in such manner or under such conditions as to constitute waste"; and

Whereas crude petroleum oil and natural gas are natural resources of this State; and

Whereas from facts presented to me by many responsible citizens including resolutions adopted at a meeting of producers and royalty owners of East Texas oil field on August 14, 1931, and representations made by a committee of citizens who called upon me and submitted facts as to the conditions that obtained in said East Texas oil field, it is evident that:

There exists an organized and entrenched group of crude petroleum oil and natural gas producers in said East Texas oil field, covering areas within the counties of Upshur, Rusk, Gregg and Smith who are in a state of insurrection against the conservation laws of the State relating to the

prevention of waste of crude petroleum oil and natural gas, [fol. 135] and are in open rebellion against the efforts of the constituted civil authorites of this State to enforce such laws; and that

As evidenced by a telegram in my hand from the Sheriff of Rusk County the sheriffs of the counties in the district defined have not a sufficient force, and under the very nature of our government could not have a sufficient force to compel operators and producers of crude petroleum oil and natural gas to obey said law, it being utterly impossible with the forces at the command of the sheriffs or other civil authorities to enforce either the orders of the Railroad Commission of Texas or the laws pertaining to the waste of crude petroleum oil or natural gas against an entrenched group of insurrectionists such as are violating the law in the territory defined; and that

The first called session of the Forty-second Legislature enacted a new conservation law amending existing statutes; and in order to give the Railroad Commission of Texas sufficient time to have hearings and promulgate porper orders providing for the conservation of crude petroleum oil and natural gas in the district above defined during which time without the presence of protecting authority the crude petroleum oil and natural gas in said district are being unlawfully dissipated and wasted and the land owners and royalty owners being robbed of their royalties by unscrupulous and lawless producers, transporters and operators; and that

[fol. 136] By reason of the reckless, unlawful and criminal handling of producing wells in said district water is being rapidly drawn into the oil sands, thereby creating enormous physical waste of crude petroleum oil, and more than 1,000,000,000 cubic feet of natural gas, rich in gasoline content, are being wasted, all of which causes a great loss of revenue to this State, and does, and will, affect the welfare of our educational institutions, including our common schools, eleemosynary institutions, and each and every state department of the State Government, and will increase the burdens of taxation upon our people generally; and that

The existing condition has brought about a state of public feeling on the part of citizens, that if the State Government cannot or fails to protect the public interest and the interest of the land and royalty owners they will attempt to

take the law into their own hands, and by force of arms shut down the producing oil wells in said defined district until the State can and will enforce the conservation laws; and that

In at least one instance, as reported to me, an oil company operating in said defined district has oredered representatives of the Oil and Gas Division of the Railroad Commission of Texas who were performing their lawful and official duties from their leases; and

Whereas this condition has caused threats of acts of violence on the part of indignant responsible citizens against those who openly, flagrantly and rebelliously violate [fol. 137] the laws and defy the constitutional civil authorities of this State; and

Whereas a state of insurrection, tumult, riot and breach of the peace does exist in the defined area; and

Whereas in addition to the insurrection, tumult, riot and breach of the peace that does now exist in the said defined area, there is now imminent danger of said insurrection, tumult, riot and breach of the peace threatening serious danger to citizens and their property being extended not only in the territory heretofore described, but in other areas of this State where oil and natural gas is being produced by operators who are obeying the laws relating to the conservation of crude petroleum oil and natural gas; and

Whereas, it is necessary for the preservation of the crude petroleum oil and natural gas in the defined district that the reckless and illegal exploitation of the same be stopped until such time as the said resources may be properly conserved and developed under the protection of the civil authorities; and

Whereas Section 10 of Article 4 of the Constitution of the State of Texas makes it the duty of the Governor of the State to "cause the laws to be faithfully executed"; and

Whereas section 7 of Article 4 of the Constitution of the State of Texas makes the Governor of this State the Commander-in-Chief of the military forces of this State, and gives him "power to call forth the militia to execute the laws of this State";

[fol. 138] Now, therefore, I, R. S. Sterling, Governor of the State of Texas, and Commander-in-Chief of the military forces of this State, do by virtue of the authority

vested in me under the Constitution and laws of this State declare that the conditions above described do exist and are clearly violative of the Constitution and laws of this State, and that by reason of this the conditions contemplated in Article 5889 of the Revised Civil Statutes of Texas of 1925 exist in the following described territory, to-wit: "The Counties of Gregg, Upshur, Rusk and Smith in the State of Texas."

And I do hereby declare Martial Law in said territory, effective at six A. M. the seventeenth day of August, A. D. 1931; and I hereby direct Brigadier General Jacob F. Wolters to assume supreme command of the situation in the territory affected and without delay shut down each and every producing crude oil well and/or producing well of natural gas, and to further take such steps as he may deem necessary to enforce and uphold the majesty of the law, subject to the orders of the Governor of Texas and Commander-in-Chief of the military forces of this State, as given through the Adjutant General.

In Testimony whereof I have hereunto signed my name officially and caused the Seal of the State of Texas to be hereunto affixed at my office at Austin, Texas, this the 16th day of August, A. D. 1931, at twelve o'clock Noon.

(Signed) R. S. Sterling, Governor of Texas.

By the Governor:

Watt L. Saunders, Assistant Secretary of State.

(Seal).

[fol. 139] A true copy, I certify.

(Signed) W. W. Sterling, the Adjutant General.

[fol. 140] EXHIBIT "B" TO ANSWER

Executive Office,
Austin, Texas, October 29, 1931.

To Brigadier General Jacob F. Wolters, in command military forces East Texas oil fields, Kilgore, Texas.

SIR: Whereas I have received advice and information, believed by me to be reliable and true, to the effect that the present production of oil in the Counties of Gregg,

Upshur, Rusk and Smith, in th State of Texas, is such as to now endanger the oil field and to destroy or seriously impair the present oil wells; and,

Whereas I have received advice and information, believed by me to be reliable and true, to the effect that there is much dissatisfaction among land owners and small operators because of the foregoing conditions, and that if such conditions are permitted to continue the result will be acts of violence, breach of peace, disorder, possible destruction of property, and serious interference with the suppression of insurrection, to suppress which Martial Law was declared in said counties, effective August 17, 1931, and which is now and has at all times since said date been in full force and effect; and,

Whereas I believe that it is necessary, as a precaution against acts of insurrection, riot, breach of peace, tumult and general disorder, of which there is immanent danger [fol. 141] in the aforesaid counties, and that it is a proper measure and the only means at my command to suppress the existing insurrection in said counties and prevent further acts of insurrection, riot, tumult, breach of peace and general disorder in said counties, and to remove the existing immanent danger of such unlawful acts in said counties, for me to cause oil production from each oil well in said counties to be limited and restricted for the present to 150 barrels of oil per day;

Now, therefore, you are hereby commanded and directed to issue and promulgate, as the order of the Governor of Texas and commander-in-chief of the military forces of this State, your order allowing not to exceed 150 barrels of crude petroleum to be produced per day from any well in the Military District, as defined in said Original Proclamation, No. 8447, and to put the same into full effect as the military orders of your command effective at 7 A. M., October 29, 1931.

The Original Proclamation, No. 8447, dated August 16, 1931, is hereby continued in full force and effect, subject to this order.

(Signed) R. S. Sterling, Governor of Texas.

By the Governor.

(Signed) W. W. Sterling, the Adjutant General.

[fol. 142] EXHIBIT "C" TO ANSWER

Executive Office,
Austin, Texas, November 6, 1931.

To Brigadier General Jacob F. Wolters, in command military forces, East Texas oil fields, Kilgore, Texas.

SIR: Whereas, for the reasons given in Executive Order addressed to you of date October 29, 1931, it is necessary to further restrict and limit the production of oil in the Military District, composed of the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas;

Now, therefore, you are hereby commanded and directed to issue and promulgate as the order of the Governor of Texas and Commander-in-chief of the Military Forces of this State an order allowing not to exceed 125 barrels of crude petroleum to be produced per day from any well in the Military District, as defined in the Original Proclamation, No. 8447, declaring Martial Law in the Counties of Gregg, Upshur, Rusk and Smith, and to put same into full effect as the military orders of your command effective at 7 A. M. November 7, 1931.

The Original Proclamation, No. 8447, dated August 16, 1931, is hereby continued in full force and effect, subject to this order.

(Signed) R. S. Sterling, Governor of Texas.

By the Governor.

(Signed) W. W. Sterling, Adjutant General.

[fol. 143] EXHIBIT "D" TO ANSWER

Executive Office,
Austin, Texas, December 10, 1931.

To Brigadier General Jacob F. Wolters, in command military forces, East Texas oil fields, Kilgore, Texas.

SIR: Whereas, for the reasons given in Executive Order addressed to you of date October 29, 1931, it is necessary to further restrict and limit the production of oil in the Military District, composed of the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas;

Now, therefore, you are hereby commanded and directed to issue and promulgate as the order of the Governor of Texas and Commander-in-Chief of the Military Forces of this State an order allowing not to exceed one hundred (100) barrels of crude petroleum to be produced per day from any well in the Military District, as defined in the Original Proclamation No. 8447, declaring Martial Law in the Counties of Gregg, Upshur, Rusk and Smith, and put same into full effect as the Military Orders of your command effective at seven A. M. December 11, 1931.

[fol. 144] The Original Proclamation, No. 8447, dated August 16, 1931, is hereby continued in full force and effect, subject to this order.

(Signed) R. S. Sterling, Governor of Texas.

By the Governor.

(Signed) W. W. Sterling, Adjutant General.

[File endorsement omitted.]

[fol. 145] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO COMPLAINANTS' FIRST AMENDED ORIGINAL PETITION AND BILL OF COMPLAINT—Filed Jan. 4, 1932

Come now the defendants, C. V. Terrell, Lon A. Smith, and Pat M. Neff, being the duly elected, qualified and acting members of the Railroad Commission of Texas, and the defendant, James V. Allred, the duly elected, qualified and acting Attorney General of Texas, and the defendant, V. McDavid, the duly elected, qualified and acting county attorney of Rusk County, Texas, and in answer to Complainants' First Amended Original Petition and Bill of Complaint, say as follows:

I

That the recent conservation act passed by the First Called Session of the Forty-second Legislature, commonly known as House Bill 25, was passed and approved on the 12th day of August, 1931.

II

That on the 16th day of August, 1931, the Honorable Ross S. Sterling, Governor of Texas, by executive procla-
[fol. 146] mation No. 8447, declared the counties of Gregg, Upshur, Smith and Rusk, in the State of Texas, to be in a state of insurrection, tumult, riot and breach of peace, and declared martial law in said counties and directed Brigadier General Jacob F. Wolters, of the Texas National Guard, to assume supreme command of the situation in said counties, and to take such steps as might be deemed necessary by him to enforce and uphold the majesty of the laws of this State. That immediately thereafter, on August 17, 1931, said commanding officer of the said military district did assume supreme command and has at all times and on all occasions mentioned in the Complainants' bill exercised the authority therein conferred, and martial law has been ever since and is now effective in said counties, including the lands and premises described in Complainants' bill.

III

That on September 2, 1931, the Railroad Commission of Texas, after due notice and hearing, issued and promulgated an order entitled Conservation and Prevention of Waste of Crude Petroleum Oil and Natural Gas in the East Texas Field, which said order is self-explanatory. That on September 4, 1931, Brigadier General Wolters issued his general order No. 10, which, among other things, adopted the order of the Railroad Commission, last above referred to as a military order, and the same was by him so enforced.

[fol. 147] IV

That on September 18, 1931, the Railroad Commission of Texas issued and promulgated a supplemental order which, in effect, reduced the allowable production of oil per well in the East Texas District from two hundred twenty-five (225) barrels per day to one hundred eighty-five (185) barrels of oil per day. That on September 19, 1931, Brigadier General Wolters issued his general order No. 12, in substance adopting the supplemental order of the Rail-

road Commission last above referred to, making it his military order, and thereafter enforced the same as a military order.

V

That on October 10, 1931, the Railroad Commission of Texas issued and promulgated a second supplemental order, in substance reducing the daily well allowable of crude oil in said East Texas District from one hundred eighty-five (185) barrels to one hundred sixty-five (165) barrels. That on the same day Brigadier General Wolters issued his general order No. 14, adopting the last above mentioned supplemental order of the Railroad Commission as his military order, and thereafter enforced the same as such.

VI

That on October 13, 1931, Complainants' bill was filed in this Court, and this Honorable Court on the same day issued a temporary restraining order enjoining and restraining these defendants, as well as others, from in any manner or method interfering with Complainants in the production of oil and/or operation of their wells on the [fol. 148] properties described in Complainants' bill.

VII

That on the same day, October 13, 1931, Ross S. Sterling, Governor as aforesaid, issued a supplemental proclamation which, among other things, directed Brigadier General Jacob F. Wolters to issue and promulgate as the orders of the Governor of Texas and the Commander-in-Chief of the military forces of Texas, an order allowing not exceeding one hundred sixty-five (165) barrels of crude petroleum oil to be produced per day from any well in the military zone, as defined in the original proclamation No. 8447, dated August 16, 1931, and to put same into full effect as the military orders of his command until otherwise ordered. That on the same day, October 13, 1931, Brigadier General Wolters issued his general order No. 15, which complied with the supplemental proclamation of the Governor in ordering that no well in the military district be permitted in excess of one hundred sixty-five barrels of crude petroleum oil per day, and the same was enforced by the said Brigadier General Wolters as his military order.

VIII

These Defendants would show to the Court that since October 13, 1931, when the restraining order was issued by this Honorable Court, they have not attempted, and are not now attempting or threatening, to enforce any of the orders of the Railroad Commission limiting the per-well production of oil in the so-called East Texas District, or limiting the oil-gas ratio complained of in Complainants' bill, and especially is this true of the properties described in Com- [fol. 149] plainants' bill, all of which is admitted in said bill.

IX

The above named Defendants further respectfully represent to the Court that each and all of the several orders promulgated by the Railroad Commission of Texas, complained of in Complainants' bill, expired by their terms on October 13, 1931, and that the Railroad Commission of Texas has not since October 31, 1931, issued or promulgated any order or orders limiting the production of crude petroleum oil or the gas-oil ratio in said four (4) counties above named.

Wherefore these defendants and each of them deny that the Complainants or either of them are entitled to the relief sought, and pray that the temporary restraining order heretofore granted by this Honorable Court be dismissed, and that these defendants go hence and recover their reasonable costs in this behalf expended.

(Signed) Maurice Cheek, Assistant Attorney General; (Signed) Elbert Hooper, Assistant Attorney General; (Signed) Fred Upchurch, Assistant Attorney General, Attorneys for Above-named Defendants.

[fol. 150] *Duly sworn to by C. V. Terrell. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 151] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANTS' MOTION FOR LEAVE TO AMEND ANSWER—Filed Jan. 4, 1932

Come now R. S. Sterling, Governor of Texas; W. W. Sterling, Adjutant General of the State of Texas; and Jacob F. Wolters, Brigadier General, Texas National Guard, Defendants herein, and respectfully ask leave of the Court to amend their answer to Plaintiffs' First Amended Original Petition and Bill of Complaint, by interlineation as follows:

1

Amend Paragraph XLVI, by adding thereto Section H-1, to read as follows:

"On or about December 10th, 1931, the Defendant R. S. Sterling issued oral and written orders to the Defendant Jacob F. Wolters, Commanding Officer of said Military District, to limit the production of oil in said Military District to 100 barrels per well *wer* day. The Defendant Jacob F. Wolters accordingly limited the production of oil within said Military District to 100 barrels per well per day in compliance with these orders issued to him by R. S. Sterling, [fol. 152] Governor of Texas and Commander-in-Chief of the Military Forces of the State of Texas, his superior and commanding officer.

In this connection, Defendants aver that on said date and thereafter the limitation of the production of oil in said Military District to 100 barrels per well per day was, and now is, necessary in the suppression of insurrection, tumult, riot, and breach of the peace in said Military District and to prevent insurrection, tumult, riot, breach of the peace, and general disorder therein; and that these Defendants, and especially the Defendant R. S. Sterling, Governor of Texas, so believed, and believes. A true and correct copy of the Order hereinabove described is hereto attached, marked Exhibit "D," and expressly made a part hereof to the same extent and effect as if herein copied in hæc verba."

2

Amend Section J of Paragraph XLVI, by substituting for the word "August," on page 29, line 8, of Defendants' Answer, the word "October."

3

Amend Section K of Paragraph XLVI, by adding thereto the following:

"And on or about December 10th, 1931, issued an order restricting the said production of oil in said Military District to 100 barrels per well per day, and each of said Orders was executed and enforced by the Defendant Jacob F. Wolters as the Order of R. S. Sterling, Governor of Texas and Commander-in-Chief of the Military Forces, his superior [fol. 153] and Commanding Officer, and said Order is now being enforced for said reason set out in Paragraph J."

4

Amend Section M of Paragraph XLVI, by inserting in line 2 thereof, between the words "Martial Law" and "in the counties," the following: "and restrict the production of oil."

5

Amend Section M of Paragraph XLVI, by inserting therein, between the word "counties" and the words "as soon as," found in line 9 of said Section, the following: "and to cease restricting the production of oil therein."

6

Defendants respectfully say that each and every amendment herein set out is necessary in order to fully state facts essential to defendants' case, and that each of said amendments sets out facts to the existence of which each and every of these defendants is willing to make oath, and that attorneys for plaintiffs herein have long since had notice of defendants' desire and intention to amend their pleading substantially as herein set out.

Wherefore, defendants pray the Court for leave to amend their answer by interlineation or otherwise, as hereinabove set out.

[fol. 154] (Signed) Paul D. Page, Jr., (Signed) Dan Moody, (Signed) E. F. Smith, Attorneys for Defendants, R. S. Sterling, W. W. Sterling, and Jacob F. Wolters. Smith, Brownlee & Goldsmith, of Counsel.

[File endorsement omitted.]

[fol. 155] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION

No. 365. In Equity

E. CONSTANTIN et al.

vs.

LON SMITH et al.

DECREE—Filed Feb. 26, 1932

On January 4th, A. D. 1932, this cause came on to be heard on the application for temporary injunction, and all parties appearing in person and by counsel and having announced ready, and evidence having been introduced and arguments thereon having been presented and heard by a statutory court composed of three judges, being the Honorable Joseph C. Hutcheson, Jr., Circuit Judge in and for the Fifth Circuit, the Honorable Wm. I. Grubb, United States District Judge, and Honorable Randolph Bryant, United States District Judge for the Eastern District of Texas, and after taking the matter under consideration, plaintiffs not having pressed their cause of action against the respondents composing the Railroad Commission of Texas, accordingly no order is entered in this cause with respect to the controversy between the complainants and the respondents composing the Railroad Commission of Texas, and the said Commission is unrestricted in its future actions in that respect and the complainants shall be entitled to such relief thereon, if any, which the law affords; but the court is of the opinion that the relief requested by the complainants against the respondents, Hon. Ross S. Sterling, Hon. W. W. Sterling and Hon. Jacob F. Wolters, should be granted.

It is, accordingly, on this the 26th day of February, A. D. 1932, ordered, adjudged and decreed by this court that the respondents, Hon. Ross S. Sterling, Hon. W. W. Sterling and Hon. Jacob F. Wolters, and all persons acting for or with or under the direction of them, be and they are hereby enjoined from enforcing against complainants any of their so-called military or executive orders, passed or to be passed, regulating or restricting the production of oil from the complainants' wells, or from in any manner, directly or indirectly, interfering with the lawful production of oil from complainants' property.

This injunction to remain in force, subject to the further orders of this Court, until the final adjudication of this cause; and complainants will post a bond in the penal sum of $1,000.00, conditioned as required by law for injunction bonds of this character, and upon the filing of such bond [fol. 156] and the approval thereof by the Clerk of this Court, writs in accordance with this decree will be issued.

Randolph Bryant, by J. H. H. Jr.; Wm. I. Grubb, by J. C. H. Jr.; Jos. C. Hutcheson, Jr., Judges of the Statutory Court for the Eastern District of Texas.

Approved.

Jos. W. Bailey, Jr., Fred Upchurch, for R. R. Com. of Texas.

[File endorsement omitted.]

[fol. 157] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION

Equity. No. 365

E. CONSTANTIN et al.

vs.

LON SMITH et al.

Before Hutcheson, Circuit Judge, and Grubb and Bryant, District Judges

OPINION

Statement

Plaintiffs' bill as originally brought on October 13, 1931, was against Lon Smith, C. V. Terrell, and Pat M. Neff,

constituting the Railroad Commission of Texas, James V. Allred, Attorney General, v. McDavid, County Attorney, A. B. Capers, and Jacob F. Wolters. In brief, the bill alleged that the Commission, in purported pursuance of the administration and application of the oil and gas conservation laws of Texas denouncing waste, but in reality in pursuance of an arbitrary scheme in the interest of prices, to keep production in the East Texas oil fields to within 400,000 barrels a day, had in violation of the Constitution of the United States arbitrarily limited production from plaintiffs' wells in Rusk County to 165 barrels a day each, when each of their wells could produce without waste of oil or gas, 5,000 barrels a day depriving plaintiffs of their property without due process of law, and denying them the equal protection of the laws. That the other defendants named were cooperating with the Commission in giving effect, by threat and force, to its confiscatory orders and actions. That none [fol. 158] of the defendants could respond in damages, and plaintiffs' loss, unless prevented by injunction, would be irreparable. The prayer was for temporary and final injunction, and for a restraining order pending hearing.

The District Judge set the matter for hearing on the application for temporary injunction for October 28, before the statutory court which he proceeded to organize, and issued a temporary restraining order as prayed, restraining the defendants from limiting plaintiffs' production below 5,000 barrels per well. Under the protection of this order plaintiffs opened their wells, but only for a brief time, for, though the other defendants obeyed and respected the order, the defendant Wolters, directed so to do by the defendant R. S. Sterling, Governor of Texas, shut them in. Thereafter the Governor, conceiving that by virtue of the proclamations issued and to be issued, he, his Adjutant General, W. W. Sterling, and his Brigadier General, Jacob F. Wolters, were not amenable to court process, while the Commission was, took over from the Commission to whom alone the Legislature had delegated the administration of its oil and gas conservation laws, (MacMillan vs. Comm., 51 Fed. (2d) 400; Henderson vs. Comm. — Fed. (2d) —) what one of the commissioners calls "the pro-ration end" of its jurisdiction, that is, the fixing of well allowable, while "leaving the conservation end with the Commission," that is, leaving the Commission in full charge of all matters as

to which no injunction had been issued or applied for. Upon [fol. 159] written directions of the Governor, given him from time to time, the Defendant Wolters has since been issuing purported military orders, designed to keep and keeping the production of the East Texas oil fields within 4,000 barrels per day. These orders at first adopting the Commission's allowable of 165 barrels per day per well, have as new wells came in, carried reduced quantities, until at the time of the trial of this suit they permitted plaintiffs and others to produce only 100 barrels per day, reducing the total daily allowable for the field to around 300,000 barrels.

Contempt proceedings against Wolters and the filing of new pleadings making R. S. Sterling, Governor, and W. W. Sterling, Adjutant General, parties to the suit have followed these actions. When the matter came on for hearing on January 4th, on the application for temporary injunction, the case had changed from its original aspect of one challenging the constitutionality of the Texas oil and gas conservation laws, and the action of the Commission purporting to have been taken in accordance with them, and seeking relief against the Commission and its aides, including Wolters, to one challenging as an arbitrary and tyrannical taking over of plaintiffs' property, the shutting in of their wells pursuant to the military orders issued under the direction of the defendant Sterling, by the defendant Wolters. Plaintiffs say that these actions, taken under orders purporting to have been issued as martial law expedients under the authority of statutes of Texas author- [fol. 160] izing the Governor to call out the militia to enforce the laws and to suppress insurrection and riot, violate the Fourteenth Amendment as to plaintiffs, either, as plaintiffs contend, because they are unauthorized by those statutes, or if authorized, because the statutes themselves are void.

To plaintiffs' amended bill the Railroad Commission, the Attorney General and Capers make answer that since the restraining order was issued they have observed it. That the order of the Commission, which the restraining order enjoined the enforcement of expired on October 31st, and that since that time the Commission has not taken and under present conditions is not now contemplating, any action to limit production. By the filing of their pleading the Com-

mission has placed itself on the record as to plaintiffs, where it has for sometime been, in fact, in a state of inaction, watchfully waiting.

The defendants, the two Sterlings and Wolters, by their answer assert that they are as to the actions examined here, the State; that the suit is therefore one against the State and may not be maintained. They further plead the proclamation of the Governor, hereinafter more fully mentioned, declaring a state of insurrection to exist in the Counties of Gregg, Upshur, Smith and Rusk in the East Texas oil fields, declaring martial law there, and placing defendant Wolters in supreme military command of the district. They plead the proclamation issued in October after the issuance of the temporary restraining order, and the subsequent proclamations reducing barrelage per well in the field. They allege that each and every action taken by them has been in the exercise of the war powers which the proclama—[line [fol. 161] omitted in copy]—rection, and particularly that each order made regulating the oil to be taken from each well was made, not for the purpose of limiting the production of oil, but in order to avoid and prevent threatened riot and insurrection. They assert that the Governor, by the force of these proclamations, has conclusively established that a state of insurrection and riot existed in the East Texas oil fields and continues to exist there. One of defendants' counsel concretely and correctly condenses the pleading thus:

"The Governor of Texas being authorized to declare, and having declared a state of insurrection, riot, tumult, and breach of the peace to exist and impend in Rusk County, Texas, a state of insurrection, riot, tumult, and breach of the peace exists and impends there."

That by the force of these proclamations a state of war exists, which gives his actions and those of his Adjutant General, the military officer in supreme command, and their subordinates a military cast, placing them presently above judicial inquiry and restraint. That while he elects by proclamation to declare the continuance of a state of war there, he, by their force, insulates himself and them form present accountability in the courts, and may do with the property of a citizen free from restraint, whatever in the exercise of his unrestrained will as military commander he

decides as a military measure it is necessary to do. That the United States Courts are therefore without jurisdiction to injure at all into his conduct, or the conduct of his subordinates in taking over and controlling plaintiffs' property; that all citizens in that territory are, as to military meas- [fol. 162] ures, subject to no law but the will of the commander, while, by executive fiat, he maintains martial law there.

The evidence comes in without substantial conflict. It establishes that the 42d Legislature, at its First Called Session in August, 1921, passed an amended oil conservation act. That on August 16th the Governor issued his proclamation reciting the provisions of the Constitution and statutes of Texas for the conservation of oil and gas, the existence in the East Texas oil field, comprising the Counties of Upshur, Gregg, Rusk, and Smith of an organized group of oil and gas producers who are in a state of insurrection against the conservation laws. That the civil officers have not a sufficient force to compel them to obey. That by reason of their reckless production enormous physical waste is being created. That this condition has brought about a state of public feeling that if the state government cannot protect the public's interests, they will take the law into their own hands. That this condition has caused threats of acts of violence. That it is necessary to give the Railroad Commission time to have hearings and promulgate proper orders to put the law into force. That a state of insurrection, tumult, riot, and breach of the peace exists in the defined area, and there is serious danger threatening to citizens and property, not only there, but in other oil-producing areas of the state. And

"Whereas it is necessary for the preservation of the crude petroleum oil and natural gas in the defined district that the reckless and illegal exploitation of the same be stopped until such time as the said resources may be properly conserved and developed under the protection of the civil authorities, and

Whereas the Constitution of Texas makes it the duty of the Governor of the State to cause the laws to be faithfully [fol. 163] executed, and gives him the power to call forth the militia to execute the laws of the State,

I do hereby declare martial law in said territory and I hereby direct Brigadier General Jacob F. Wolters to assume

supreme command of the situation in the territory affected and to take such steps as he may deem necessary to enforce and uphold the majesty of the law,"

the troops were called out; the wells were shut down.

In September after the Commission had established an allowable per well, while the proclamation of martial law was not rescinded, nor the troops entirely withdrawn, the military occupation in force ended. The wells were opened and continued to produce daily under the order and direction of the Commission, the statutory agent of the State in such matters. Thereafter General Wolters with the assistance of the Rangers, the civil officers of the community, and the few military still remaining in the field, in aid of the Commission, patrolled the territory to see that its orders were obeyed and observed and thereafter the Commission from time to time, sometimes with the approval, sometimes with the disapproval, of the Governor, made orders reducing the allowable, which orders were obeyed.

After the Court's injunction had issued the defendants Sterling and Wolters determined not to brook court interference with the program of restricted production which they determined to continue, and in the real, though mistaken, belief that the Federal Court, while competent as to the Commission, was, during the continuance of the pro- [fol. 164] claimed state of war, without jurisdiction over their actions, under the claim, which we find wholly without support in the evidence, that war conditions were prevailing in the field and that military necessity required the action ousted the Commission from the fixing of any superintendence over the daily production allowed, and have since controlled production by purported military orders. The Commission, acquiescing in the action, took no steps to modify or dissolve the temporary restraining order.

It was conceded that at no time has there been any actual uprising in the territory. At no time has any military force been exerted to put riots or mobs down. At no time, except in the refusal of defendant Wolters to observe the injunction in this case, have the civil authorities or courts been interfered with or their processes made impotent. Though it was testified to by defendants that from reports which came to them they believed that if plaintiffs' wells were not shut in, there would be dynamiting of property in the oil

fields, and efforts to close them and any others which opened by violence, and that if that occurred there would be general trouble in the field, no evidence of any dynamite having been used, or show of violence practiced or actually attempted, or even threatened against any specific property in the field was offered. We find therefore that, not only was there never any actual riot, tumult, or insurrection which would create a state of war existing in the field, but that, if all the conditions had come to pass, they would have resulted merely in breaches of the peace, to be suppressed by the militia as a civil force, and not at all in a condition constituting, or even remotely resembling a state of war.

[fol. 165] It was testified to by defendants Sterling and Wolters that whatever result the limitation of production might have had on price, the orders which they issued limiting production were not issued for that purpose, nor even per se to limit production, but as acts of military necessity to suppress actual threatened war, they believing from reports brought to them that unless they kept the production of oil down to within 400,000 barrels, a warlike riot or insurrection, in effect a state of war, would ensue.

We find no warrant in the evidence for such belief. Looking at it in the light most favorable to defendants' contention, it presents nothing more than threats of violence or breaches of the peace. The testimony showed that martial law had not ousted the Commission from making and enforcing rules regulating conservation, except alone as to production from the field. One of their witnesses testified:

"Now the Governor with his military representatives has taken over the proration end, but the conservation end is still with the Commission."

The evidence shows no insurrection nor riot; in fact existing at any time in the territory, no closure of the courts, no failure of civil authorities. It shows that at no time has there been in fact any condition resembling a state of war, and that, unless the Governor may by proclamation create an irrebuttable presumption that a state of war exists, the actions of the Governor and his staff may not be justified on the ground of military necessity.

Upon this record plaintiffs assert that there can be no state of war existent in the territory and that the orders

[fol. 166] and actions taken on military grounds are and have been nullities. Ex Parte Milligan, 4 Wall. 2. That a state of war with resultant martial law, no law, but when war's afield merely the will of the commander (Commonwealth vs Shortall, 65 L.R.A. 207; U. S. vs Fischer, 280 Fed. 210) with its supremacy of the military over the civil authorities, its suspended laws, its closed courts, which it is claimed the Governor's mere fiat has brought about here, cannot under the Constitution of Texas exist. They assert that the Constitution nowhere in terms provides for, nor in spirit or letter permits, martial law. On the contrary, that its provisions that courts shall always be open, that the military shall always be subordinate to the civil authorities, that its laws may be suspended only by the Legislature, that the writ of habeas corpus may never be suspended, forbid the existence of martial law as here claimed. That the Governor's declaration of it, and the acts taken in pursuance of it, are, as to these plaintiffs, nullities. That while the Governor undoubtedly has the discretion to determine when he will call out the troops, he calls them out, never as a military, but always as a civil officer. Not only are he and the militia always subject to the civil authorities, but their powers are only civil powers, and must be found in the civil laws. Franks vs Smith, 134 S.W. 484; Fluke vs Ganton, 123 Pac. 1051. They assert further that under no conditions may a Governor in Texas or elsewhere by mere fiat create an insurrection and declare martial law in the fiated territory, (Ex Parte Lavinder, 108 S.E. 429); that on the face of these proclamations and under the undisputed facts it appears as a matter of law that the only [fol. 167] insurrection or riot in the territory was not one of fact, but by fiat. That the proclamations were issued after October 13th, the pretended military status set up, and the pretended military action taken, not to meet and suppress a warlike insurrection, because there was none, but because the Governor decided to, and supposed that, immune from court orders, he could keep the production of oil down. That the claim of defendants in this suit that the actions taken against plaintiffs were induced by military necessity is but a subterfuge and pretense through which the Court may and must look.

They say finally that whatever might be the difficulties, if any, which would confront the state courts of Texas in

challenging in the protection of plaintiffs' property rights —and they say there are none (Stockwell vs State, 110 Tex. 551)—the overweening and unwarranted pretensions of the Governor asserted here, the Federal courts face none. State vs Biernquist, 3 A.L.R. 1483; Baker vs Taylor, 3 L.R.A. 316; Abelman vs Booth, 21 How. 514; Re Ayers, 123 U.S. 507.

They say that it is inconceivable that a Governor of a state may by proclamation that a state of war exists requiring the establishment of martial law, not only take the property of a citizen, but when an injunction has been issued by a Federal Court against other officers of a state restraining them under the guaranties of the Fourteenth Amendment from depriving a suitor of his property, may, using the very agent whom the Court has enjoined, thrust that agent between the suitor and the Court, and staying its processes himself in the name of martial law, take from the suitor the fruits of the order obtained and visit upon [fol. 168] him the very deprivations which the court had restrained.

Defendants' arguments in support of their contention that the proclamations of the Governor have created an unexaminable and irrebuttable presumption that a state of war exists, which has authorized to the extent necessary to suppress the proclaimed riot, the setting up there for the time being of a military dictatorship in which all of the powers of government, as government is known among us, the legislative, the judicial, and executive, the power to make, the power to construe, the power to execute the laws, that is, the rules which the subject must obey are concentered in the person of the Governor as military chief, the Adjutant General and the Brigadier General as supreme commanders in the field, and that during the time the Governor elects to maintain by proclamation his military suzerainty there, the people of those counties are subject, to the extent that he considers it necessary to take military action, to the unrestrained will of the commander in their persons and their property, without recourse to the courts for relief, though the courts are there functioning undisturbed.

That should a court of the United States undertake to act, they may disregard it, proceed upon a series of as-

sumptions universal in their nature, and pretentious in their scope, asserted boldly and with conviction. They are—

(1) That though the Constitution and laws of the State of Texas do not refer at all to state of war, and nowhere authorize in terms the declaration of martial law the power to declare a state of war exist and by declaration of martial law for the time being to suspend the operation of [fol. 169] the civil laws and particularly access to the courts, springing from the common law of self defense applicable to governments and individuals alike, inheres in the Governor of the State as its executive head; and further, is implied in the provision of the Constitution authorizing the Governor to call out the militia to enforce the laws and suppress insurrection and riots, and in the statutes authorizing him to use the militia for that purpose, and to better enforce the law, to declare a state of insurrection to exist. That this power to declare the existence of a state of war and to put into effect martial law, though not expressly conferred, is yet a power in the nature of sovereignty resident in the Governor, the exercise of which is confided entirely to his discretion and is not subject to judicial review.

(2) That martial law operates only when a state of war exists, and resting as it does upon the theory of necessity, knows no law while it is in operation except the will of the commander, and brooks no interference from the civil courts. That though after its termination all concerned in it may be held responsible for abuses of power, the actions of the commander and his subordinates, no matter how oppressive and unreasonable, or how harshly they may beat upon and take the property of a citizen, may not be restrained or even inquired into by the courts, state or national, during the time, no matter how long continued, that the Governor elects by proclamation of continuing necessity, to keep it there. That its declaration creates a state of war, with its consequence, inter arma leges silent, [fol. 170] and that a state of war which commenced in August, 1931, is still existing there.

HUTCHESON, J.:

This suit, involving the exercise of the judicial power of the United States to restrain by injunction R. S. Sterling,

W. W. Sterling, and Jacob F. Wolters, holding the offices respectively of Governor of the State of Texas, Adjutant General, and Brigadier General, from, under the claim of military necessity, limiting the production from plaintiffs' wells in the East Texas oil fields where the Governor has declared martial law, presents in a fundamental way, questions of executive and judicial power.

The case is one of wide interest and concern. It has been thoroughly and adequately briefed by counsel of distinction and ability. Our disposition of it has been greatly aided by the candor and excellence of the briefs filed. Plaintiffs' counsel have filed one brief, defendants' counsel two; one brief has been filed amicus curiæ in support of, one against the martial law jurisdiction asserted. The arguments, as befits the subject, have taken wide range; in the grand manner they have discussed the great themes of liberty under law, separation of powers, the rights of man, the sovereign powers of states, the Federal Constitution as the supreme law of the land. Plaintiffs' brief reciting a tale of ancient wrongs at the hands of tyrannous execu- [fol. 171] tives, professes to see in the actions and purposes of defendants here, despotism and tyranny, walking again, to perpetrate old outrages under new pretenses. Both plaintiffs and defendants conjure here the spectre of usurpation of powers, judicial and executive. We do not start at such spectre-conjuring on either side. The judicial branch has neither purse, nor sword, nor ministers to execute its will. Its decrees take their force alone from the purity and the justness of its judgments; while the executive in our time, though strong in theory, is of all men most bound to show a decent respect to the opinions of mankind, and may not ever be any stronger than the gathered force of public opinion.

It is entirely evident, however, that unless we keep firmly in mind that this is a cause in court involving real rights and real issues, in which the judgment must be not what one wills, but what one must; not a philosophical debate in which the judges may decide not what is, but what ought to be, the temptation to match forensic with judicial opinions will not only make this opinion over long, but will add to the already too long list of so-called martial law

opinions, most of them the bitter fruit of industrial passion, still another one so concerned with general principles that it says far more than it decides.

Courts of equity should and must decide cases as private, not as public controversies, and determine them accordingly.

[fol. 172] We turn then to a consideration of this case as it is, a private controversy in which plaintiffs, complaining of the illegal deprivation of their property, invoke the chancery powers of this Court to prevent it.

We examine the questions propounded and the authorities cited in the light not of abstractions, but of the case before us, first premising what the case is not; then what it is.

Stripped of the involvement with which its contentious course has invested it, and considered as it now presents itself for decision, it is not a proceeding for habeas corpus as Ex Parte Milligan, 4 Wall. 2 was, nor one under Sec. 41, Sub. 14 of the Judicial Code, to redress the deprivation of civil rights, as were the Federal cases of Moyer vs Peabody, 148 Fed. 870; 212 U.S. 78; United States vs Wolters, 288 Fed. 69; United States vs Fischer, 280 Fed. 218; United States vs. Adams, 26 Fed. (2d) 141. Nor is it a petition for writ of habeas corpus as were Common wealth vs Shortall, 206 Pac. 165, 65 L.R.A. 193; in re Moyer, 85 Pac. 190; Ex Parte Lavinder, 108 S.W. 428; In Re Boyle, 45 L.R.A. 632; Ex Parte Jones, State ex rel Mayes vs Brown, 45 L.R.A. (NS) 997 to 1058; Ex Parte McDonald, 1915B L.R.A. 998. It is not a suit for damages, as were Nerlihy vs. Donohue, 11 L.R.A. 1917B; Bishop vs. Vandersook, 200 N.W. 210; Mitchell vs Harmony, 13 How. 115; Franks vs Smith, 142 Ky. 232; L.R.A. 1917A 1141; Luther vs Borden, 7 How. 1; Allen vs Gardner, 109 S.E. 261. It is not a case like Martin vs Mott, 12 Wheat, 19; Chapin vs Terry, 15 L.R.A. 116; Sweeney vs Commonwealth, 82 S.W. 639, involving solely the question of the right in one case of the President, in the others of the Governor, to call troops out; [fol. 173] nor is it even, so far as this three-judge court is concerned with it, a contempt case, like Fluke vs Canton, 123 Pac. 1049, for the disobedience of an injunction. It is not a case like Hartranfts Appeal, 85 Pa. 432, of an effort of a state grand jury to prosecute an inquiry into the pub-

lic actions of the Governor in using military force to suppress an insurrection. Nor does the case in any manner involve a general inquiry into or an effort to restrain the general power of the Governor to call out troops or to take such actions generally with them as he may see fit. The case involves merely the right of a citizen to relief against acts in deprivation of his property, and the questions of martial law and the power of the Governor come up as incidental to the inquiry, and are drawn into it and affected by it only in so far as it is necessary to settle that inquiry. Dunn vs Fort Bend Co. 17 Fed (2d) 329.

It is perfectly clear that unless the defendants can maintain their proposition that they are ad hoc the State and therefore may not be sued, or that the declaration of martial law has superseded the Federal Constitution as the supreme law of the land, and during the time of its fiat continuance placed defendants above accountability to the courts, plaintiffs are entitled to equitable relief, for no clearer case of deprivation of rights inhering in private ownership of property under color of law, can be imagined than is here occurring. It could not be, and it is not contended that under ordinary conditions, that is, martial law absent, a Governor and the militia could expropriate the [fol. 174] management of private property, as they are now doing. It remains only to inquire whether the defendants because of the proclamations find themselves so situated as that a court of the United States may not exert its jurisdiction upon complaint against their actions to inquire into them or if it may, may not, under the undisputed facts obtaining, grant relief.

[fol. 175] Looking first to defendants' contentions, we think it might reasonably be expected that in support of pretensions so vast, of authority so absolute and uncontrolled as here asserted, of power in the executive of a state by fiat to suspend not only the constitution of the state, but of the United States, to the extent of depriving their courts of jurisdiction to inquire into and redress grievances, defendants would point to enabling constitutional provisions, state or national, or at least clear and convincing authority supporting their claim.

We have examined the constitutional provisions which they rely on. We have examined every authority cited by them. We have found none, we conclude that none exist,

which as against the claim of deprivation of property, supports defendants' claims to immunity from judicial inquiry and none which has even considered, much less disclosed that a court of the United States may not, by injunction, prevent the deprivation of property such as is here occurring.

Upon the first proposition advanced, that this is a suit against the State and that as such it may not be maintained, the authorities overwhelm that this is a suit under the First Subdivision of Sec. 41 of the Judicial Code to redress the deprivation of property arising under the Constitution and laws of the United States (Holt vs. Indiana, 176 U. S. 70) and that as such it is not a suit against the State, but against persons in their individual capacities, to prevent them from enforcing statutes in themselves unconstitutional, or unconstitutional as attempted to be en- [fol. 176] forced and applied. That in such a suit, when it is found, that an individual acting under the assumed authority of the state as one of its officers, and under color of its laws has come into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character and subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from the Supreme authority of the United States. In re Ayers, 123 U. S. 507; Reagan vs. Farmers Loan & Trust Co. 154 U. S. 362; Ex Parte Young, 209 U. S. 123; Yickwo vs. Hopkins, 118 U. S. 22; Truax vs. Raich, 239 U. S. 131; Green vs. Louis & Interurban R. R. 244 U. S. 507; MacMillan vs. Comm. 51 Fed. (2d) 400; McLeaish vs. Binford, 52 Fed. (2d) 151. In this suit plaintiffs invoke the exercise of the judicial power of the United States which, vested by the Constitution in its courts, extends to all cases in law and equity arising thereunder. LaAbra Silver Mining Co. vs. U. S. 175 U. S. 732; Kansas vs. Colorado, 206 U. S. 83.

No exertion of this power rests on clearer or more certain grounds than that of its chancery jurisdiction. It is exercised uniformly throughout the nation unaffected by statutes, usages or customs of the several states. It is properly commensurated with every right or duty declared or necessarily implied by and under the Constitution of the United States, and its jurisdiction to inquire into a cause and determine whether it presents a matter of equitable

cognizance may not be infringed or impaired by the constitution of any state or by any act or proceeding of the legislative, the executive or the judicial branch of a state. Truax vs. Corrigan, 247 U. S. 344. Of the chancery juris-
[fol. 177] diction no phase of it has a better settled basis, a more comprehensive and remedial scope than that which it employs to prevent persons acting under the authority or color of State laws, from denying the due process and equal protection which the Fourteenth Amendment guarantees. This must necessarily be so, for independent of each other in their respective spheres as are the state and Federal governments, the Constitution of the United States is the supreme law of the land, and the courts of the United States, as the repositories of Federal judicial power, are compelled to and will assert and vindicate its supremacy, to protect the rights of individuals menaced by personal aggression masked under official power. U. S. vs. Tel. 106 U. S. 208; Ableman vs. Booth, 21 How; Re Ayers supra; Terrace vs. Thompson, 263 U. S. 214.

Defendants do not, they cannot point to any provision of the Federal Constitution or statutes which exalts an officer of the State when acting beyond his power, above the authority of the courts of the United States; which subordinates the Federal courts acting within their spheres, to the authority of the officers of the State or which permits anything to "be interposed between the individual and the obligation he owes to the Constitution and laws of the United States, which can shield or defend him from their just authority, and the extent and limit of that authority the Government of the United States, by means of its judicial power, interprets and applies for itself."

It follows that plaintiffs' suit as alleged, being one to restrain the officers of the State from enforcing against them in a confiscatory way, the laws of that State on the ground that such laws or their enforcement are opposed to the Constitution of the United States, and particularly
[fol. 178] the Fourteenth Amendment thereof, this Court, organized as a statutory court under Sec. 380 has undoubted jurisdiction to inquire into the merits of the cause, and to adjudicate in accordance with its merits. Authorities supra, and Okla Gas vs. Russell, 261 U. S. 292; W. & A. Ry. vs. Com. 261 U. S. 264.

We reject then, as entirely without substance, contrary to the genius of the two governments, Federal and state, and opposed to the very conceptions upon which this government was founded and has been maintained, the contention that any officer of a state, whether acting in a civil or a military capacity, whether executive, legislative or judicial, can by proclamation or otherwise, erect himself above Federal court inquiry, withdraw his actions affecting property from judicial inquiry, and insulate himself from judicial process and the consequences of disobedience to judicial decree. Re Ayers, Ableman vs. Booth, U. S. vs. Lee supra.

We come then to an examination of the case upon its merits, first inquiring what are the provisions of the State Constitution under which this power is claimed, and next, whether in this state or in any other, any court, state or Federal, has ever declared that persons in an industry dominated and taken over by the executive of a state for the purpose and with the result of controlling production, and kept under control, as this has been, for some six months, are powerless to obtain injunctive relief against such executive aggression because of the fact that the Governor has issued a proclamation of martial law, and is controlling the production of oil upon the ground that it is necessary to do so in order to prevent persons who would become enraged if production were not kept down to the figure they desire, from committing acts of incendiarism and violence.

[fol. 179] The provisions of the Constitution on which defendants rely are—

Art. 4, Sec. 1. "The Executive Department of the State shall consist of a Governor, who shall be the chief executive officer of the State;"

Art. 4, Sec. 10. —"shall cause the laws to be faithfully executed—"

Art. 4, Sec. 7. "Shall be the commander in chief of the military forces of the State * * * he shall have power to call forth the militia to execute the laws of the State to suppress insurrection, repel invasions, protect the frontier from hostile incursions by Indians, or other predatory bands."

The Legislature has made the following provisions:

Art. 5889. "Whenever any portion of the military forces of this State is employed in aid of the civil authorities, the Governor, if in his judgment the maintenance of law and order will thereby be promoted, may by proclamation declare the county or city in which the troops are serving or any special portion thereof, to be in a state of insurrection."

Art. 5834 provides:

"The Governor may order the active militia, or any part thereof, to assist the civil authorities in guarding prisoners * * * or discharging other duties in connection with the execution of the law as the public interest or safety at any time require."

Art. 5778 provides:

"The Governor shall have power in case of insurrection, invasion, tumult, riot or breach of the peace, or imminent danger thereof, to order into active service of this state any part of the militia that he may deem proper."

Art. 5830 provides:

"When an invasion of, or an insurrection in, this state is made or threatened, or when the Governor may deem it necessary for the enforcement of the laws of this State he shall call forth the active militia or any part thereof, to repel, suppress or enforce the same."

It will be noted that nowhere in either the Constitution or the statutes is a state of war referred to, or the declaration of martial law authorized. It is nowhere provided that the Governor may institute it, or that he may in any manner or under any circumstances, suspend the laws and deprive persons of access to the courts. Considering these [fol. 180] provisions alone, we think the defendants' case fails for want of affirmative authority, in that the provisions they invoke do not contain the grant of power claimed.

But we do not rest our conclusion alone upon the silence of the Constitution in not granting such power, for it has by express provision withheld such power and prevented beyond peradventure, it there being implied. That the Governor may, in his discretion, call out the militia, the Constitution does indeed provide. That the Constitution has prohibited to the Governor the power by proclamation to suspend the Constitution and laws, the power to invest himself with a military character which will confer on him and the militia any extraordinary powers not given by the civil laws, or place them above the corrective reach of the courts as here contended, the Constitution of this State and the applicable authorities make pefrectly clear.

Martial law, the law of war, in territory where courts are open and civil processes run, is totally incompatible with, it can not co-exist with provisions such as are contained in Article 1, Bill of Rights of the Texas Constitution.

Sec. 2. "The writ of habeas corpus is a writ of right, and shall never be suspended."

Sec. 12. "All courts shall be open."

Sec. 19. "No citizen of this State shall be deprived of life, liberty, property privileges or immunities except by due course of the law of the land."

Sec. 24. "The military shall at all times be subordinate to the civil authorities."

Sec. 36. "No power of suspending the laws in this State [fol. 181] shall be exercised except by Legislature."

Having in mind the great issues out of which these constitutional provisions grew, the courts of Texas have never faltered in straitly upholding them. Men learn but to forget, to learn and forget again. Sometimes they learn their lessons at such price of sorrow and shame, of bitterness and anger, that graven on their hearts the lessons lie, deep beyond forgetting. At such times, men yearning toward their posterity write these lessons down as imperishably as they may so that they may stand as the Lord's remembrancers, to save their children from like passion and travail. Of this kind are the constitutional provisions

above set out. They were written into the fundamental law by men who had suffered under the imposition of martial law during Reconstruction in Texas. These provisions had their origin under practically the same conditions which wrote into the English Bill of Rights limitations on the power of the king to suspend the laws. Their authors had petitioned the Congress of the United States for relief in vain. In every convention, in every gathering assembled, protesting the suppression of free speech, the interference with the processes, the judgments and decrees of courts, they had denounced these tyrannous acts and sought relief from them, and when they met to adopt the Constitution of '76 which still obtains, they determined to and they did so write the fundamental law that such deprivations of liberty might not occur again.

One of counsel for defendants urges that here is no case of suspension of laws, no case of deprivation of due [fol. 182] process. Here is due process, the exertion of the power of police. That the exercise of such power inherent in government violates neither the Constitution of the State nor of the United States. The argument begs the question.

Certainly if the actions of the Governor and of his subordinates here complained of are valid exercises of the police power of the state, they are not contrary to, they accord with, they do not violate, they conform to, the law. On the contrary, if they represent attempts to exercise police power not conferred upon the Governor, they are invalid under both Constitutions. The police power is subordinate to the Constitution, as is every other power of government. It may be exercised only when and by whom the Constitution authorizes its exercise, and in the judicial branch of the Government alone resides the power to determine whether it is being so exercised, Stockwell vs. State, 110 Tex. 551; Spann vs. City of Dallas, 111 Tex. 350. Without variableness, neither shadow of turning, the courts of Texas down to this very day, mindful of the occasion, the purpose and the meaning of these constitutional safeguards, keeping faith with them, have kept the Constitution paramount. Royal vs. State, 69 S. W. 504; Brown Cracker Co. vs. Dallas, 104 Tex. 294; Box vs. Newson, 43 S. W. 983;

Stockwell vs. State;[1] Spann vs. City of Dallas;[2] Crossman vs. City of Galveston, supra.

When the Governor calls out the troops in Texas he calls them out not as a military, but as a civil officer. Their powers and duties are derived from, they must be found in, the civil law. At no time and under no conditions are their actions above court inquiry or court review.

This does not mean, of course, that the military, acting as peace officers, may not in emergencies exercise summary power. They may; but so may peace officers. "Measures are sometimes necessary under the police power that are severe." 148 Fed. 876. But these measures referred to were not military, they were civil measures taken in and justified by necessity. If we were without direct authority for these views, they would commend themselves to us as the only ones in accord with the genius of a government

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NOTE 1.—"The police power is subordinate to the Constitution as is every other power of government. If this were not so the result would be to subject the citizen's property solely to executive authority, putting it beyond the protection of the courts and depriving the courts of [fol. 183] their essential power to determine what under the written law, was lawful and what was not. Declaring the law of the land and adjusting property rights accordingly." Stockwell vs. State.

NOTE 2.—"The substantial value of property lies in its use. If the right to use be denied, the value of the property is annihilated and ownership is rendered a barren right. The police power is a grant of authority from the people to their governmental agents. * * * In its nature it is broad and comprehensive. * * * While this is true, it is only a power, it is not a right. The powers of the Government under our system are nowhere absolute. The fundamental rights of the people are inherent, and can not be yielded to the governmental control. * * * Constitutional power can never transcend constitutional rights.

"The police power is founded in public necessity, and only public necessity can justify its exercise." Spann vs. City of Dallas, supra.

like ours. The view we take, however, has received positive and authoritative sanction, first in the courts of Kentucky, the "dark and bloody ground" where men learned both to love and to know liberty, and by adoption afterwards, in Montana, North Carolina, Michigan and Oklahoma. Frank vs. Smith, 142 Ky. 232 lays down, we think, with precision and power the rights of the Governor of a state, in the calling out and use of the militia. His unquestioned right to call it out is conceded. That his and the militia's status when called out is that of civil officers, whose only power must be found in civil laws, and that they are always subject to those laws, is declared in no uncertain terms. There the difference between the unquestioned right of the Governor to call out the militia, which all the authorities concede, and his right to erect himself and [illegible]n above the law, giving them super powers, is set out. That court in terms rejected the doctrine, as applied to Kentucky, held in Re Moyer, Commonwealth vs. Shortall, 206 Pac. 165 that civil emergencies requiring the calling out of troops may be declared to be a state of war, and a military government may then ensue. Upon those points it said:

"It must nevertheless be kept in mind that in the exercise of the power to call out troops the Governor acts in his capacity as a civil officer of the State and not as commander in chief of its army. As the chief civil magistrate of the State he calls out and must direct, in accordance with law, the movements and operations of the military force. 'The military shall be at all times and in all cases in strict subordination to the civil power.' It is so written in Section 22 of the Bill of Rights. We have not, and can not have, in this state, a military force that is not and will not be subordinate to the civil authorities. The military can not in any state of case take the initiative, or assume to do anything independent of the civil authorities. Ours is a government of civil, not military forces. The militia in active service and in every emergency that arises in such service is subordinate to the civil power. The soldier and the citizen stand alike under the law. Both must obey its commands and be obedient to its mandates. * * * We are not willing to concede that in any exigency that may arise the military is superior to the civil authorities, nor

do we believe that the time will ever come when the military forces of the state, acting under and in obedience to the civil laws of the State, will not be able to control under the authority conferred by these laws, any situation that may present itself."

[fol. 185] And further:

"After mature consideration we have reached the conclusion that any military order, whether it be given by the Governor of the State or an officer of the militia, that attempts to invest either officer or private with authority in excess of that which may be exercised by peace officers of the state, is unreasonable and unlawful." * * * "We * * * hold, as a matter of law" that the orders of the military "are confined to such as a peace officer in the discharge of his duty might execute. What one can not do, neither can the other; what one may do, so may the other."

Again:

"On the other hand, to say that the state militia acting in obedience to military orders may commit any act that may suggest itself to the commanding officer as being necessary to restore peace and quiet, although such act may be a greater violation of law than was committed by the person it was visited upon, would place the militia above the civil authorities, and give to the soldiers powers not conferred upon the civil officer charged with the duty of enforcing the law. The command of the officer would take the place of statutes, and there would be no limitation upon his conduct except such as his judgment and discretion might dispose him to adopt. We can find no warrant, either in the Constitution or statute * * * for investing the military forces of the State with arbitrary power like this."

And finally, pointing to the full power existing under the statutes of Kentucky and at common law, in civil officers to meet emergencies, it declares:

"There is no occasion for, there can not be, the erection in any part of Kentucky of a military government."

This case has been accepted as authority, its principles fully quoted and applied, in Kluke vs. Canton, 123 Pac.

1049; Bishop vs. Vandercook, 200 N. W. 278; Ex Parte Milligan 143 Pac. 948; Allen vs. Gardner, 109 S. E. 260. Recognizing as it does, the universally accepted view that martial law is the law of actual military necessity, in the actual presence of war, it is administered by the general of the army and is in fact his will. U. S. vs. Diekleman, 92 U. S. 526. Martial law is founded on paramount necessity. It is the will of the commander of the forces. In [fol. 186] the proper sense it is not law at all. Re Ezeta, 62 Fed. 972. "The will of the military chief is, subject to slight limitations, the law of the military zone." State vs. Brown 45 L. R. A. (N. S.) 999, it declares that the Governor of a state may not by proclamation, bring about such a condition of civil anarchy. It but declares and re-affirms the doctrine fixed beyond cavil and for all time by the Milligan case, that martial law and civil law are mutually contradictory; they may not co-exist. That martial law cannot exist where there is no real state of war, where the ordinary tribunals are functioning and orderly courts are run. That under constitutions like ours in times of peace such military dictatorships may not be established by military fiat.

We accept these principles in their fullest implications as principles obtaining in Texas under her constitution and laws. We hold with the Supreme Court of Montana, in Ex Parte MacDonald, 143 Pac. 947, that under the Constitution of Texas courts may not be closed, or their processes interfered with by military orders; that courts cannot be ousted by the agencies detailed to aid them, or their functions be transferred to other tribunals unknown to the Constitution; with the Court in Herlihy vs. Donohue, 161 Pac. 164, "The Governor is at all times amenable to the Constitution and laws of the State. They are the charters of his power and in them he must find the authority for his official acts." And that "while at times within the narrow limits of actual and pressing necessity, private property may be taken and destroyed for the public good, in every [fol. 187] instance where such rights has been exercised and questioned, the decision upholding the right makes it clear beyond controversy that only the most overriding necessity will justify or excuse;" with the Supreme Court of West Virginia, in Ex Parte Lavinder, 108 S. E. 428:

"Martial law is a drastic and oppressive system. Under it the rights, privileges and liberties ordinarily possessed and enjoyed by citizens are greatly restricted and abridged, and the powers of the military officers are infinitely larger than those conferred upon the civil officers. Hence it ought not to be put into effect except upon occasions of dire and inexorable necessity. Limitation of the power of the Governor to invoke and apply it only on occasions of actual warfare and within the area of actual hostilities renders it impossible for him to set aside the civil laws and rule by his practically unrestrained will under any other circumstances."

We agree with Judge Symes in United States vs. Adams, 26 Fed. (2d) 141, that if the Governor of this State can do what he here asserts, "it logically follows that the protection of the Fourteenth Amendment is a matter of favor only, depending on the whim of the Governor, and not an absolute right."

We agree with Judge Nuessle, then District Judge, now Justice of the Supreme Court of North Dakota, in the views expressed by him when, granting an injunction restraining the Governor of North Dakota, acting as the chief executive, and commander in chief of the military forces of the State, from taking over and operating coal mines in that state upon the grounds of public shortage and necessity, he said:

"It is not so material that this court shall pass upon the propriety of the executive declaring martial law. As I read the authorities there is no occasion for martial law unless the courts themselves have been so incapacitated by reason of the circumstances existing and calling forth a declaration of martial law, that they are unable to function. The reason for martial law is the necessity to rehabilitate the courts, not to destroy them or usurp their powers. Bruce 'The Non-Partisan League,' pp. 134 to 139."

[fol. 188] The writ of prohibition and injunction applied for by the Governor to the Supreme Court was, in State ex rel Governor Frazier vs. Nuessle, D. J., by a divided court denied Opinions were filed but not reported. The dissenting opinion of Bronson, J. Cites the authorities upon which defendants rely.

We have found no case, we have been cited to none, supporting a view, contrary to that which we take here, that under a Constitution like ours a Governor may by proclamation bring about a state of war. It is true that some of the decisions in their generalization lend color to this view. An analysis of the decisions will show, however, that that color is spurious. The confusion with which the subject under investigation by us is invested has arisen not from what has been decided in cases, but from what has been said in them, from an attempt to follow not stare decisis, but stare dictis. None of the so-called martial law cases cited to us, and only two that we have found, State ex rel Governor Frazier vs. Nuessle, Dakota Coal Co. vs. Frazier, 283 Fed. 415, temporary injunction granted, declared moot and reversed in 267 Fed. 133, have dealt with a situation even remotely resembling the one involved. Therefore none are authority for our views, except as the general principles asserted in them furnish analogies for our course.

In the examination which we have made of them, we have found that however they may differ in argument and result, one general principle runs through them from the Borden case to the Lavinder case, that dire necessity and dire necessity alone, the necessity of self defense, suspends ordinary constitutional guaranties, and that where that necessity does not in fact exist, no such suspension occurs.

[fol. 189] In West Virginia, whose cases are most strongly relied upon by the defendants, Judge Poffenbarger in Ex Rel Mayes vs. Brown, 45 L. R. A. (NS) 997, and in Re Lavinder, makes this crystal clear. In the first case, which was a case involving long continued, desperate and dangerous violence and disturbance, he declares:

"It is said that the proclamation of martial law ousts or suspends the civil jurisdiction. These expressions are hardly accurate. The invasion or insurrection sets aside, suspends or nullifies the actual operation of the Constitution and laws. The proclamation of martial law simply recognizes the status or condition of things resulting from the invasion or insurrection, and declares it."

In the second case, although in West Virgnia the Governor by statute has the power to declare a state of war (See Mayes vs. Brown) Judge Poffenbarger, on the author-

ity of the Milligan case, refused to permit proclamation to take the place of fact, saying:

"The substitution of the military for the civil law in any community is an extreme measure; socially, economically and politically it is deplorable and calamitous. Its sole justification is the failure of the civil law to operate and function. For the time being, by reason of the paralysis or overthrow of its agencies, the consequences of an insurrection, invasion or other enterprise, hostile to the State and resulting in actual warfare. * * * It is perfectly manifest that the proclamation of war did not ipso facto inaugurate martial law in Mongo County. The Governor's attempt to inaugurate and put it in force in that county, in the manner hereinbefore described, is therefore futile and inoperative."

In none of the state cases on which defendants rely was there any theoretical, there was serious, in some of them desperate and prolonged riot, destruction of property, and carnage. The decision of the court in each instance was based upon the existence of those facts, and the language [fol. 190] of the opinions must be read in that light.

The Federal cases cited, none of which, except the Wolters case, are Texas cases, may be briefly disposed of.

Luther versus Borden arose before the passage of the Fourteenth Amendment. It was a damage suit involving an arrest made during the rebellion and civil war in Rhode Island, under the authority of an Act of the Legsilature declaring martial law, and directing the taking of extreme action. The two Moyer cases were civil rights cases. They did not decide, the Supreme Court of Colorado did not decide, that the Governor of Colorado had authority to declare martial law. U. S. vs. Adams, 26 Fed. (2d) 143. "We therefore reach the conclusion that independent of the questions of the authority of the Governor to declare martial law, the petitiner, on the showing made by the return, is not illegally restrained of his liberty." Re Moyer, 85 Pac. 194. They decided merely that the Supreme Court of Colorado, having found Moyer's arrest lawful under the laws of that state, and the petition not negativing the good faith of the arrest or showing abuse of power, no lack of due process, no deprivation of civil rights, was made out by him.

The Fischer case, 280 Fed. 210 was disposed of in the assertion, as to the correctness of which no state authority was cited, but which we accept, that under the laws of the State of Nebraska the Governor had the power to declare a state of war and initiate martial law in that territory. If these assumptions as to the law of Nebraska are sound, plaintiff was not deprived of his civil rights.

The Wolters case, 268 Fed. 70, another civil rights case, [fol. 191] was on a petition for writ of habeas corpus, opinion by Judge Rufus Foster of Louisiana while sitting in the Southern District of Texas, for release from imprisonment in default of payment of fine imposed by a miiltary court set up in Galveston after martial law had been proclaimed, and some of the civil magistrates had been removed from office, and a military court set up in Galveston after martial law had been proclaimed, and some of the civil magistrates had been removed from office, and a military court set up in their stead.

In this case the relator conceded away the point at issue here, whether the Governor could by proclamation, declare martial law. On page 71, the Court said "I must conclude that the Governor had complete authority to institute martial law in the City of Galvetson. That is conceded by the relator." From that erroneous conclusion, induced, certainly aided by the concession, the learned Judge proceeded to conclude that the Governor could do anything necessary to make his proclamation effective. That case correctly decided "the question whether there was riot or insurrection or breach of the peace is one solely for the Governor, and that the courts will not interfere with his discretion in that and will not inquire whether or not the facts justify it." It incorrectly assumed in the Governor in addition to that unquestioned power the existence of the stupendous one asserted here, the power to by proclamation, set aside the laws and institute a military government in place of a civil, a power not only not granted, but forbidden to the Governor of Texas.

Upon a consideration of the whole case we hold not that [fol. 192] we may, or that we do, inquire into the propriety of the Governor's calling out the troops to enforce the law, but that they were called out to act as civil officers, with no

greater power than civil officers would have, and that in their actions they are amenable to inquiry, as civil officers are, and that neither the proclamation of martial law, nor the purported military character of the actions constitutes any defense to plaintiffs' suit. That defendants Jacob F. Wolters, R. W. Sterling, and W. W. Sterling have been without warrant of law interfering with and illegally depriving plaintiffs of their undoubted right to operate their own properties in a prudent and reasonable way, and in accordance with the laws of the State, and that from further interference, pending the final disposition of this suit, they must be enjoined.

It does not follow, however, that plaintiffs may have their injunction without terms. For though the pursuit of the ignus fatuus, martial law, with its claims of military necessity and action in extremis has caused all parties to this suit to lose sight of the real, the fundamental facts which the pleadings and the evidence present, and of which we may take judicial knowledge (Hnederson vs. Comm. — Fed. (2d) — we may not do so. These facts are that the East Texas oil field is of great extent, and if proper measures are taken to safeguard against waste of oil and gas stored there, it has enormous production potentialities. That it is the concensus of informed opinion, with which plaintiffs do not disagree, that the general operation of wells in that field to their full capacity would result in actual physical waste of oil and gas, and injury to the strata in [fol. 193] which it is confined. That before the taking over by the Governor, upon the ground of military necessity, of the wells in the field the Railroad Commission, the statutory agent of the State for the administration of its conservation laws, had undertaken the duty of and was determining the amount of oil which might be taken daily without waste, and but for the action of the Governor in ousting it from the exercise of its jurisdiction, it would still be doing so.

We have held in MacMillan vs. Comm. 51 Fed. (2d) * * * and Henderson vs. Comm. — Fed. (2d) —that the State of Texas has the power to conserve its resources of oil and gas, and prohibit the waste thereof. That the Commission is the body charged with the administration of those laws, and that its orders issued in pursuance thereof, are prima facie valid. This case began with a complaint against the

Commission's orders, as to which no evidence has been offered.

It is true that the orders of the Commission have expired, and that we are without the guidance of their findings under present conditions as to what may be safely taken without waste. Nor is there any evidence before us upon which we could form a conclusion of our own as to what amount of oil might safely, without violation of the statutes' prohibition against waste, be produced from plaintiffs' wells.

We may not, in view of the attitude which the plaintiffs and the Commission have taken in this cause in not pressing the issue between them, at this time make any decision on that issue or grant any relief as to the commission. In [fols. 194-196] this situation, we are disposed to authorize a decree enjoining the defendants, the two Sterlings and Wolters, from enforcing against plaintiffs any of their so-called military orders already passed or to be passed, regulating or restricting the production from their wells, and from in any manner interfering with the lawful production of oil from plaintiffs' property, conditioned upon the plaintiffs before opening their wells to produce more than their neighbors are now content without complaint of oppression to produce, making a showing as to what amount of oil can be reasonably taken therefrom per day; or preferably, upon the condition that pending a further hearing of the controversy between the plaintiffs and the Commission as to the right of the Commission to limit their production, plaintiffs produce no more oil than that which, upon a specific and precise examination of their wells, and a finding under the statutes prohibiting waste, the Commission finds the wells may produce without the waste prohibited by law.

A decree prepared in accordance with these views may be presented to the District Judge for settlement within fifteen days.

[fol. 197] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION

No. 365. Equity

E. CONSTANTIN et al.

vs.

LON SMITH et al.

Narrative Statement of Evidence—Filed Feb. 26, 1932

CAPTION

Be it remembered that upon the hearing of the above numbered and entitled matter, upon the application of Complainants for temporary injunction, before the Honorable Joseph C. Hutcheson, Jr., United States Circuit Judge, the Honorable W. I. Grubb, United States District Judge, and the Honorable Randolph Bryant, United States District Judge, at Houston, Texas, on the 4th day of January, A. D. 1932, et seq., the following evidence was adduced and proceedings had.

APPEARANCES OF COUNSEL

Messrs. Bailey, Nickels & Bailey, appearing for the Complainants.

Hon. Elbert Hooper and Hon. Fred N. Upchurch, Assistant Attorney Generals, appearing for the Respondents, the Attorney General of Texas and the Railroad Commission of Texas, and V. McDavid.

Paul D. Page, Jr., Esq., Dan Moody, Esq., and E. F. Smith, Esq., appearing for Respondents R. S. Sterling, Jacob F. Wolters, and W. W. Sterling.

[fol. 198] COLLOQUY BETWEEN COURT AND COUNSEL

Judge Bryant: E. Constantin et al. vs. Lon Smith et al. Are the Complainants ready?

Mr. Bailey: The Complainants are ready.

Mr. Upchurch: The Railroad Commission and the Attorney are ready.

Mr. Smith: May it please the Court, for the defendants R. S. Sterling, Jacob F. Wolters and W. W. Sterling, we have been furnished this morning in coming into court, with certain supplemental pleadings which we have not had an opportunity to study. These may require an answer and for that reason we can not announce either one way or the other at this time.

Judge Bryant: Is there any new matter incorporated in those pleadings, Mr. Smith.

Mr. Smith: Your Honor, I haven't had an opportunity to read but the first page so I don't know what is contained in the new pleadings.

Mr. Bailey: If your Honor please, the pleading referred to was necessary by reason of the fact that answers of the respondents were given to the complainants, and particularly one of the answers was not given to us until Saturday. However, we feel that there is no new matter in the pleadings, just simply such as we felt the record required to deny as contained in the answer of the respondents, particularly the respondents Hon. R. S. Sterling and others. However, we have no desire to push the matter except to say that rather than have any kind of continuance we [fol. 199] would ourselves withdraw the response. We think without a doubt there is no new matter and we think respondents' counsel, Mr. Page, has so stated to me this morning.

The Presiding Judge: Just let the matter be filed and let the respondents reply to it during the course of the trial. If there is any new matter in it strike it out if it interferes with the progress of the trial. Go ahead with the trial.

Mr. Smith: Let the record show an exception on the part of these defendants.

The Presiding Judge: An exception to what?

Mr. Smith: To the ruling of the Court requiring us to proceed with the trial without an opportunity to study these pleadings.

The Presiding Judge: Do you want to make a motion? If you want an exception make the motion. What is your motion? Do you want to continue or do you want to try, or what do you want to do?

Mr. Smith: We would like to have an opportunity to study these pleadings.

The Presiding Judge: You mean you want the Court just to wait here a few days until you study them?

Mr. Smith: No, I don't think it would take a few days, [fol. 200] just probably until two o'clock.

The Presiding Judge: Well, be specific, sir, just what you wish.

Mr. Smith: Well, I would want until two o'clock to see whether it was necessary to file a motion to strike certain portions of it. In other words, this is an important case, your Honor, and we don't want to go into trial of a case on pleadings we have never had an opportunity to read.

The Presiding Judge: Do you want to move to strike the pleadings?

Mr. Smith: Yes, sir, and we want an opportunity to prepare that motion.

The Presiding Judge: Why were the defendants' pleadings filed only Saturday?

Mr. Smith: Our pleadings were filed the 23rd day of December, 1931, your Honor, and copies furnished to the plaintiffs.

The Presiding Judge: What copies were filed Saturday?

Mr. Bailey: The Railroad Commission's pleadings.

The Presiding Judge: In what way will they affect these parties?

Mr. Bailey: In my opinion, in no way.

Mr. Smith: This pleading that was filed was directed specifically to the clients I represent.

[fol. 201] The Presiding Judge: Was that in reply to pleadings they filed on Saturday?

Mr. Bailey: No, sir; the pleadings of the defendants represented by Mr. Smith, a copy of their pleadings were handed to us quite some time ago, but in order to consolidate the two we awaited the answer of the other respondents. I say to the Court that I am certain there is no new matter in the response, that it was simply filed to definitely point out, as we had pointed out before, the violations as contended by their answer. There is not one new matter of fact alleged in the pleading which was filed; it is simply a specific reference to the laws and the provision of the Constitution of this state and of the United States, which we contend in our humble judgment have been violated; not one fact is so alleged.

The Presiding Judge: The defendants are unwilling to go to trial with the right to file any motions they wish to suppress, or any answer during the course of the trial. If you go to trial you want until two o'clock to examine the pleadings?

Mr. Smith: Will your Honor state that again?

The Presiding Judge: I say the suggestion is that the case go on, that you have an opportunity any time during the trial, today or tomorrow, to file any answer you want to the pleadings, or any motion you want to strike, rather [fol. 202] than to take the time to wait until you read the pleadings, and you are unwilling to do that and want the time. Is that your situation?

Mr. Smith: We think it would be better, your Honor, in order to protect our rights, to have time to study these pleadings and file any answer if that be necessary; we don't know. We always assume there is some reason when pleadings are filed; otherwise they would not have been filed. Therefore, we think we have a right to study these pleadings that were furnished to us about thirty minutes ago.

The Presiding Judge: The difficulty about it is that the Court has a limited time to hear these cases; we didn't come here to sit indefinitely, and haven't got the time. Judge Grubb and I have to be in Dallas Friday on another case of this character, and we have to get the case tried. Now, if you are going to try the case like you do before a Commission, make adjournments for three or four hours at a time while you read pleadings, we never will get through.

Mr. Smith: It is not our fault, your Honor; we filed our answer in plenty of time.

The Presiding Judge: It is not a question of fault; it is a question of prece-ding with the case rapidly.

Mr. Smith: We desire to do that but we don't want to do it in the dark.

[fol. 203] Mr. Bailey: If the Court please, on behalf of the Complainants we will state now in open Court that if those defendants represented by Mr. Smith can point out any new matter in any answer which has been filed at any time during the course of this trial, we will not except to the Court striking out the entire pleading if the Court

wishes to do that, or striking out any portion that it wishes to do so.

The Presiding Judge: Go ahead with the trial; you can have any exception you wish.

Mr. Smith: Yes, sir. Now, may it please the Court, counsel for these defendants ask leave to file an amendment to their answer; rather, amending certain phraseology in their answer, and this has been agreed to by counsel for all parties. We want the record to show that we obtained leave to file it. Do we have such leave?

The Presiding Judge: Yes.

Mr. Smith: One other thought on the preliminary matters; this new pleading which has been handed to us begins "Now comes E. Constantin and J. D. Wrather, plaintiffs, in the above styled and numbered cause" and so forth. Now, there were a number of other plaintiffs in the case. Now, we may be in error about this, but the rumor has come to us that these other plaintiffs have withdrawn from the case. We would like to have an announcement from counsel for the plaintiffs as to who are the parties at this time to this lawsuit.

[fol. 204] The Presiding Judge: All right; I think that is correct, that the pleadings do show it.

Mr. Bailey: That is correct, sir, and at the time of the beginning of the case I was going to announce, with the permission of the Court, we would like to withdraw the Brock-Lee Oil Company as a plaintiff in this case.

The Presiding Judge: It is done. Now, you wish to dismiss the case as to the Brock-Lee Oil Company?

Mr. Bailey: We wish to dismiss the case as to the Brock-Lee Oil Company subject, however, to the orders which have been heretofore entered in the case and as of this date.

Mr. Smith: Now, may it please the Court, before announcing ready on the trial for an interlocutory injunction, we would like to submit to the Court the question of this Court's jurisdiction and power to grant any of the injunctive relief as sought against these defendants, Governor Sterling, General Wolters and General Sterling.

Mr. Bailey: If the Court please, as I understand the practice, of course the question of the jurisdiction of the Court can be brought up at any time; certainly the proper prac-

tice is that such pleading be filed. I don't know exactly how to designate the answer that has been filed in this case because it contains some thirty-five pages of specifications of fact, and at the conclusion of that it continues "Wherefore, premises considered they pray that the bill be dismissed." It seems somewhat in the nature—it is, un- [fol. 205] doubtedly, in the nature of an answer to the bill of complaint filed in this case, and in the alternative they pray that if the bill be not dismissed that the injunction be denied. It makes no particular difference except in the ordinary procedure under those circumstances we would assume the burden of the opening and have the privilege of the closing, and we would like to insist upon that privilege.

The Presiding Judge: They have a right to take the matter on the motions on the face of your pleading, but in that kind of a motion the averments of the answer could not be considered. I understand he wants to test the pleading on its own face, which he has a right to do, I suppose.

Mr. Bailey: That, as I understand it, is the purpose of a motion to dismiss, but in the particular case the answer which has been filed, and the only pleading which has been filed, is denominated an answer, and as I have said before it contains twenty-six pages of specifications of fact, and then about ten pages in particular denial of the allegations of fact in the bill, about ten pages of their own specifications of fact, and at the conclusion of that it continues "Wherefore, premises considered, they pray that the bill be dismissed, and in the alternative that the injunction be denied." I, myself, am unable to state exactly what it is. It is not in the form of a motion to dismiss. They, of [fol. 206] course, have that right to take it up at any time.

The Presiding Judge: What do the defendants expect to do? Are they filing a motion which requires proof of fact, or are they filing a motion to dismiss on the face of the bill? What is it you are wanting to do?

Mr. Smith: Here is our thought, your Honor; as we understand the equity rules and the practice in the federal courts, perhaps we are in error, a motion to dismiss properly goes along with the answer. However, a question of jurisdiction can be raised at any time. We have filed here-

tofore through the original pleadings filed in this case, a formal motion setting up the grounds wherein we think this Court has no jurisdiction. In answering their supplemental bill, or amended bill, we merely put that motion to dismiss, raising the question of jurisdiction, in the answer. However, we have here ready to file at this moment, the formal motion to dismiss, unattached entirely from the answer.

The Presiding Judge: Is the jurisdictional question which you seek to raise tendered upon proof of facts to be heard before the Court?

Mr. Smith: Not at all, sir; no, sir. We say that on the face of the pleadings, plaintiffs' pleadings, this Court is without power and authority to grant the injunction relief that is sought. As we understand it, the only question for [fol. 207] this Honorable Court at this time is the granting of the interlocutory injunction.

The Presiding Judge: We will hear you on your motion then, your motion against the bill.

Mr. Bailey: We understand, if the Court please, that the rule in equity then is that the ruling on the motion to dismiss will determine the questions of fact on this interlocutory motion, or will we be called to make the proof?

The Presiding Judge: It won't determine any question of fact; it will take for granted everything you allege and determine the legal effect of it.

Mr. Bailey: But after that will we be called upon to introduce the proof or will we simply take the allegations of the bill and let the motion to dismiss be granted, or the injunction be granted?

The Presiding Judge: I suppose in addition to their motion to dismiss, they probably contest the allegations of your bill for injunction and expect to take them up later.

Mr. Smith: Precisely.

The Presiding Judge: And if this procedure which you are talking about will expedite the matter, I think it is all right to hear the motion to dismiss first. If it is just a preliminary bout and we have got to still go into the facts before we can decide anything, I would rather not take up the time now to hear the motion to dismiss, but if the [fol. 208] motion to dismiss decides the issue and you are satisfied it does, we have no objection to hearing it.

Mr. Smith: That, of course, is a matter that the Court must determine. I will say to you frankly, we have the utmost faith in the proposition that we will submit to the Court, that the Court can not inquire into these facts at all and has no jurisdiction.

The Presiding Judge: What is the point,—not the argument on it, but the point that you think determines it on the face of the plaintiffs' bill?

Mr. Smith: The first proposition is that the Governor of Texas has the power to determine the existence of facts which he determines in the exercise of his executive discretion constitutes an insurrection or imminent danger thereof.

The Presiding Judge: That is the very question, that is why I wanted you to state that.

Mr. Smith: Yes, sir.

The Presiding Judge: Does plaintiffs' bill set out any facts upon which that matter would come before us not in an action against the Commission, and don't you have to make proof of your insurrectionary fear in order to get it before the Court?

Mr. Smith: No, sir; the bill makes this allegation, that no insurrection existed, therefore for that reason the [fol. 209] martial law in that territory is utterly void and of no effect and in violation of the Constitution of the United States.

The Presiding Judge: Does the amended bill attack the question of martial law?

Mr. Smith: Yes, sir.

The Presiding Judge: Did the original bill do that also?

Mr. Smith: No, but in the last bill the Governor himself is made a party defendant, and it is asserted that the Governor had no power or authority to declare martial law.

The Presiding Judge: And you think that the bill presents all of the facts which are necessary to raise the point that you are now making?

Mr. Smith: We make this point—I want to state one of our points there, your Honor—there are many others. We raise this question on this argument: in the event our motion is overruled or the Court holds it has jurisdiction, it is our desire then, of course, to present the facts of the case for we have denied each and severally the facts al-

leged in the bill. Assuming, for the purpose of this argument, that every allegation contained in plaintiffs' pleadings are true, that nevertheless this Court has no jurisdiction to grant the injunctive relief sought as against the defendants we represent. Now, permit me to say this, if I [fol. 210] may, and if I am in error the Attorney General is here and he may correct me, as I understand it, the Railroad Commission which is a defendant to this suit, issued certain orders; those orders on their face expired on the first day of November, 1930, and in their answer here the Railroad Commission says that we are not enforcing those orders, have not attempted to do so, and are not going to attempt to do so.

The Presiding Judge: We can not consider their answer, just the face of the bill.

Mr. Smith: I am not arguing the motion now; I am merely stating the case so the Court can understand it. Now, if I am correct in that, the Railroad Commission and the Attorney General and all the defendants save and except the Governor, General Wolters and General Sterling, are entirely out of this case, and the only relief sought here as the case stands is against the defendants that we represent, that we say the Court has no jurisdiction to grant the injunctive relief as sought against Governor Sterling, General Wolters and General Sterling.

The Presiding Judge: Now, I would like to get an idea of the course of the case. If the Court sustains your theory that the matter is not justiciable here, and we can not consider it at all, of course, that would dispose of it on the argument. Assuming that the Court should differ with you on that point, what are the issues of face in the case? [fol. 211] Mr. Smith: I can briefly state they may be these; the allegation of fact is that Governor Sterling, General Wolters, the Texas Company and the Humble Company, oil corporations, and certain other persons too numerous to be designated, that they entered into a conspiracy by which it was agreed and understood in order to carry out a world program of reduction in oil production that the Governor of Texas would enforce martial law in East Texas, and by that means prevent the production of oil. Now, those allegations are denied under oath and Governor Sterling's deposition has been taken by the plaintiffs, and

he has denied all of those things there specifically; there is no evidence to support those allegations.

The Presiding Judge: Is that the case before the Court?

Mr. Smith: That is a general outline.

The Presiding Judge: No allegations at all attacking the validity of any of the laws of the State?

Mr. Smith: I don't mean to mislead the Court; I am of course, seeing the case for the defendants that I represent. They do allege that the oil conservation law enacted by, I believe it was the next to the last called session of the Texas Legislature, was invalid, and that the orders of the Railroad Commission made in pusruance thereto are void.

The Presiding Judge: Do they allege that the Governor in the declaration and the enforcement of martial law is en-
[fol. 212] deavoring to enforce the laws of Texas which are invalid?

Mr. Smith: I don't believe that specific allegation is in the pleadings, your Honor, to carry out this conspiracy.

The Presiding Judge: Of course, if the case is like you state it, merely a suit against the Governor and other persons who worked a conspiracy on the plaintiffs, and does not involve the constitutionality of any law——

Mr. Smith: That is right.

The Presiding Judge: There is no jurisdiction in a three judge court at all; Judge Bryant may have jurisdiction is that is the case.

Mr. Smith: Exactly..

The Presiding Judge: But if it is an attack on the constitutionality of the law, then it is a three judge court.

Judge Bryant: Let me ask you a question. Doesn't the original bill that was filed in this matter confine itself essentially to an attack upon the constitutionality of this statute relating to the reduction in the producion of oil?

Mr. Smith: It relates to the orders of the Railroad Commission; yes, sir, that is correct.

Judge Bryant: And doesn't that relate substantially to the amended bill, and that is still in the case?

Mr. Smith: Yes. Now, this further allegation——

The Presiding Judge: What the Court wants to do in
[fol. 213] this case is to get the issues presented in the quickest and best way possible. If the demurrer or the

motion for dismissal would dispose of it, of course that would be all right, but if the motion to dismiss would involve a considerable argument on issues which the facts would dissipate, we have wasted a lot of time and it seems to me that probably, as Judge Grubb suggested, and I think it sounds reasonable, that if we could find out in some way, either by exchange of statements between you or some other way, as to what each side contends are the issues, then we could go and develop those issues and see whether they are here in fact before we hear a good deal of argument on a hypothetical situation.

Mr. Smith: May I make this suggestion for the Court and Counsel, that counsel for the plaintiffs state exactly what their lawsuit is, to the Court, and the Attorney General's Department state what position they take with reference to the Railroad Commission and the defendants that they represent, and then I think the situation will be cleared up.

The Presiding Judge: That is what we were going to do until you brought the motion to dismiss in advance of the statement.

Mr. Smith: Yes, sir.

The Presiding Judge: I think it is just as well to let them go ahead and state the issues that are supposed to be [fol. 214] in the case, and then we can determine whether we should stop now to hear the motion to dismiss, or take it with the case.

Mr. Smith: Yes, sir.

The Presiding Judge: All right.

Mr. Bailey: If the Court please, the facts with which this bill is concerned first, are, that on the 16th day of August, or perhaps I had better go back a little further, on the 12th day of August, there became in form, at least, an act of the Legislature of the State of Texas, and approved by our Governor, providing for the conservation of oil and gas in the state. It provided for hearings by and before the Railroad Commission of Texas, upon the basis of the testimony before which would be promulgated certain orders looking to that end. Before any such hearing was held, and on the 16th day of August, the Honorable Ross Sterling, Governor of this state, issued and promulgated a proclamation declaring martial law.

The Presiding Judge: Are you stating all that from your pleadings? Is that right?

Mr. Bailey: Yes, sir.

The Presiding Judge: All right.

Mr. Bailey: Issued and promulgated a proclamation declaring what is known as martial law in the East Texas Oil Fields, without going into what that field is. In the [fol. 215] latter part of August, hearings were held by the Railroad Commission of Texas, before them, and on the second day of September an order was issued by the Railroad Commission providing for an allowable per well production in the East Texas fields of 225 barrels per day. At that time the military authorities, under the so called proclamation of martial law, were controlling, and up to that time had completely shut down every producing oil well in the East Texas field, but after promulgation of that order of their own motion, they issued an order which provided that each well should be permitted to produce in accordance with the order of the Railroad Commission, 225 barrels per day. Subsequently, and on the 18th of September, without a hearing, without notice, they reduced that amount to 185 barrels per day, and the military authorities issued their order reducing the amount of per well allowable in accordance with the Railroad Commission's orders. Subsequently, and on the 10th day of October, the Railroad Commission again, without hearing and without notice, issued its order reducing the per well allowable to 165 barrels per day, and again the military authorities issued their order reducing the allowable in accordance with that order. On the 13th day of October, this bill was filed in the Eastern District of Texas, and on that day, upon application therefor, a temporary restraining order was issued by the judge of the Eastern District of Texas restraining the defendants in that cause, being at that time the Railroad Commission of [fol. 216] Texas and the Attorney General and the County Attorney, of course, solely for the purpose of preventing the infliction of penalties, not with any view that they have participated, and against General Wolters—well, that is all that is material at that particular time; I believe Mr. Capers was in there, but I believe at that time he was a Railroad Commission official. Bond was filed for that injunction and notice was served, and very shortly thereafter, the facts of

which they will tell, Governor Sterling issued his order to the——

Judge Bryant (interrupting): That bill did specify in this injunction the fact that all these parties named as respondents to it were engaged in the enforcement of the order of the Railroad Commission of the State of Texas, in pursuance to this act of August 12, 1921?

Mr. Bailey: That is correct.

Judge Bryant: And that was the whole substance of the allegations of the bill in so far as it attacked the constitutionality of any statute or any action of any Commission?

Mr. Bailey: That is correct; the basis of that bill was that the law passed by the Legislature of Texas and the orders of the Railroad Commission in purported pursuance or compliance therewith, were contrary to the Constitution of the United States and, therefore, void. But subse- [fol. 217] quently to that time, certain other facts developed by reason of which a supplemental bill was necessary, and I was going on without making that distinction at this time. At the time of the filing of the application for injunction and its granting, and the filing of the bond, Governor Sterling then purportedly, as he claims, rejected the orders of the Railroad Commission and its attempted enforcement, and ordered the General commanding the area to permit the per well allowable not to exceed 165 barrels per day, which was exactly in accordance with the order of the Railroad Commission previous to that time, and refused to permit the enforcement by the United States Marshals, if such had been attempted, which it was not, of the order of this Court denying to the respondents in that case any right to interfere with the production of oil or gas from the properties involved in this cause.

The Presiding Judge: Are they the same parties that are in now?

Mr. Bailey: They were, sir, with the exception of the Brock-Lee. Thereafter at various times, the Governor has, without any order of the Railroad Commission, reduced the per well allowable until today it is approximately a hundred barrels.

Mr. Smith: A hundred barrels?

Mr. Bailey: Yes, sir, a hundred barrels per day. Now, that, in short, are the facts as set out in the bill. The com-

[fol. 218] plaint of the bill, however, was originally as Judge Bryant has stated, attacking the constitutionality of the law, and particularly attacking the constitutionality of the orders of the Railroad Commission made in purported compliance with that law, very much on the theory that was presented to this Court, at least in one of its phases, in the Macmillan cases. Subsequently to that, however, and by reason of the attempted enforcement of martial law in East Texas, the complainants filed their supplemental bill and the grounds of jurisdiction in that bill are principally that the Governor of this State has no power to declare martial law in this State, and secondly that there is no statute or no constitutional power granted to him to do so, although he claims such, and certainly that if there is it is in contravention of the Fourteenth Amendment to the Constitution of the United States, and that what he is doing and attempting to do impairs the obligations of contract, oil and gas leases if the court pleases, under which these complainants are entitled by contract to certain rights, privileges and immunities, and the actions of the Governor and his subordinates in that respect are impairing those obligations. In short, that is the theory of the bill without going into the facts which have been presented, and that is the theory we hope to present in this particular case. I might add one thing further, and that is that the orders of the Railroad Commission which the Governor was attempting [fol. 219] to enforce prior to October 13th, expired, all of them expired by their own terms on the 31st day of October, so that on the temporary hearing before this Court there can be no relief expected against an order which has been expired, which is already expired. On the permanent hearing, however, we shall expect to show that those orders were void, and for that reason that we have been damaged, our property taken without due process of law and without compensation, and our contracts impaired, all contrary to the Constitution of the United States and the statutes in pursuance thereof.

The Presiding Judge: The Court is not sitting now for permanent hearing.

Mr. Bailey: No, sir, and therefore we feel that to simplify the matter there could be no question, and there should

be no argument to take up the time of this court upon the validity of the Railroad Commission's orders prior to the 31st day of October. However, we yield in a certain sense because it is involved and necessarily will be involved upon the question of whether the Governor had the right to enforce the laws of this state which now, though, is in no sense a law, but prior to this time and since October 13th.

The Presiding Judge: Well, the statement does not make clear—do you allege that the Governor, in the declaration [fol. 220] of martial law, which you say was the result of a conspiracy, is declaring martial law for the purpose, and operating it for the purpose of enforcing any statute of the state which you say is unconstitutional, or do you just say that he is acting arbitrarily and not trying to enforce any law? I have in mind Section 380 that constitutes this Court just to try cases where the constitutionality of a statute is in question.

Mr. Bailey: Well, that is correct, sir. In the first place, the constitutionality of the conservation statute is in question.

The Presiding Judge: You allege that the Governor is purporting to be enforcing that statute?

Mr. Bailey: We allege that he was, yes, sir, and we allege that that statute is unconstitutional. He replies that he is not attempting to enforce the statute; we allege then that there is no statute in this state that gives him such authority, and if there is, it is unconstitutional. We allege further that if there is any such statute, and that statute is not constitutional, then the Governor arbitrarily, capriciously, and unjustly, has attempted to exercise this power when there is no basis of fact upon which to predicate it, and for that reason that his attempted exercise of the same is contrary to the Fourteenth Amendment to the Constitution of the United States which would give this court the [fol. 221] jurisdiction because the acts of the Governor in attempted purported compliance with authority which he claims, because by this act a part of the organic law of this state, and any attempt to exercise it must be enjoined by a three judge court if it is to be so enjoined. The question of the constitutionality of the Railroad Commission's acts was the original basis of this case, but by reason of the turn which the answers have taken and the facts have taken, that

now in this particular instance will not become material, we do not believe; however, we can not say positively that it will not until we hear from the Attorney General on that score.

The Presiding Judge: What I mean is, your petition alleges that the Governor without authority, in violation of your rights guaranteed by the Fourteenth Amendment, is undertaking to take action through martial law in that field. I can see that subject to the right of a Governor and his aides to raise the question of jurisdiction because of martial law, that the question would present a matter which a court would be competent to determine, but would that court be the statutory court which is now convened?

Mr. Bailey: They are claiming their authority to act by virtue of the authority of a statute of the State of Texas.

The Presiding Judge: Just exactly what statute is it?

[fol. 222] Mr. Bailey: I think it is 5330, or 5830; they refer to two other sections which are in effect the same section.

The Presiding Judge: You don't bring in question at all on your amended bill, the validity of the oil and gas conservation act passed last summer then?

Mr. Bailey: Oh, yes, sir.

The Presiding Judge: You do?

Mr. Bailey: Oh, yes, sir, yes, sir, and we must necessarily do so upon the final hearing in this case.

The Presiding Judge: Now, how do you bring that in now? Do you say the Governor is trying to enforce that act?

Mr. Bailey: Yes, sir.

The Presiding Judge: You do?

Mr. Bailey: Yes, sir. They are driven to the position they are enforcing that act or they are enforcing no law. Now, we say that that law is *on*constitutional, and there is no power to enforce it.

The Presiding Judge: You say what the Governor is trying to is to enforce the conservation law of the State of Texas, and that if the laws make such provisions as he undertakes to enforce, that they are invalid?

Mr. Bailey: Correct, sir, and in the alternative, if he is not attempting to enforce that law, then he is attempting in accordance with a certain statute of this state to enforce

[fol. 223] martial law, and we say under the Constitution of the United States that statute is void, and that it can not give him the authority which he claims.

Judge Bryant: Do I understand you, Mr. Bailey, from your statements, to waive any application which you make, presented by your bill for injunctive relief against the members of the Railroad Commission, notwithstanding the fact that there don't happen to be any existing orders in force at this time?

Mr. Bailey: Oh, no, sir, we don't waive it, but by reason of the answer which has been filed, and the facts which will be presented, the injunctive relief will not be necessary for they are not attempting to enforce the injunctive features at this time.

Judge Bryant: Don't you seek injunctive relief against the members of the Railroad Commission from attempting to enforce and promulgate any orders?

Mr. Bailey: Any orders, yes, sir.

Judge Bryant: From the date of this hearing on?

Mr. Bailey: Yes, sir, that is correct. I call the Court's attention to the sections of the statutes which their answer or their brief contends they are attempting to act under. They are 5778 of the Revised Civil Statutes of the State of Texas, which declares the Governor shall have power in the case of insurrection, invasion, tumult, riot, or the breach of the peace, or imminent danger thereof, to order into [fol. 224] active service of this state any part of the militia that he may deem proper, and I can not help add that the balance of that section is more important than the part quoted in their brief; and the other is article 5889 of the Revised Civil Statutes which provides practically the same, and in addition to the articles cited in the brief, Article 5830 provides practically the same thing, and they contend that they are entitled under those sections of the statutes to impair the obligations of contracts, take our property without due process of law, and deny*ing* to us the equal protection of the law. We say that there is no such provision in the Constitution or laws giving the Governor any such power, and we say that if he attempts to exercise it, that law is unconstitutional.

The Presiding Judge: Will the counsel for the State state its case?

Mr. Upchurch: Counsel *the* the plaintiff has simplified the issue as far as we are concerned, representing the Railroad Commission and the Attorney General. They simply admit that after this temporary restraining order was granted by the judge of the Eastern District, we have not undertaken to enforce any Railroad Commission order whatsoever, and further, that the orders which were then in existence expired under their own terms on the 31st day of October, and we have not issued any further order, and as I recall the pleadings, I don't think counsel even alleges that we are threatening or attempting to promulgate or [fol. 225] enforce any orders at this time. So as stated by Mr. Bailey, it seems that there is no action for any injunctive relief against us, at least.

The Presiding Judge: We will hear the statement of the case from the other defendants.

Mr. Moody: Your Honors, if it please the Court, in connection with Mr. Bailey's statement, it is our understanding of the plaintiffs' bill that they admit in their pleading that the orders of the Railroad Commission that were being enforced, or that they were attempting to enforce, at the time the original petition was filed, expired under their own terms on the 31st day of October, 1931, and that since that time there have been no orders issued by the Railroad Commission. We understand it appears from the bill that there is no allegation made that the Railroad Commission is at this time attempting to enforce the act of the First Called Session of the Forty-second Legislature, but that from and since—nor do we understand that there is any allegation that the attorney general's department is suing or threatening to sue for any penalties under that law, or that there is any contention made that any have accrued under that law. But the amended petition, as now prepared, it seems presents to the Court not the question of the constitutionality of the statute, but rather the power of the executive to exercise a discretion in determining that an insurrection exists, to declare martial law, and to employ the [fol. 226] National Guard in the enforcement of martial law and the conservation of the public peace, and that his challenge in his bill is on the power of the Governor to exercise such discretion, claiming that the courts have the right to review its exercise, and contending that in the enforcement of martial law which has reduced the produc-

tion of the wells to a hundred barrels a day, I think, that the Governor, acting in that capacity has done so without legal authority, that he has taken their property without due process of law, that he has violated the provisions of the Fourteenth Amendment to the Constitution of the United States. Now, we understand t-at it is the power of this Court or rather the Court will——

The Presiding Judge: What is the answer of the Governor and the other parties?

Mr. Moody: Mr. Smith will state that, if your Honor please; the question that we raised or that precipitated this discussion, was that the Court was required to look to its own jurisdiction, and we suggest to the Court that the pleadings make the issue as stated and that it is not one of which this Court has jurisdiction; that the fair construction of the pleadings of both parties is that it is a contest over the power of the Governor to declare martial law, and whether or not the declaration and enforcement of martial law can be questioned under the Fourteenth Amendment [fol. 227] to the Constitution of the United States where the suit is between resident citizens of the same state.

Mr. Smith: Very briefly, may it please the Court, I will state the answer of the defendants Governor Sterling, General Sterling and General Wolters.

The Presiding Judge: Mr. Smith, I forgot to say, I didn't hear Mr. Bailey make any statement at all about the allegation of conspiracy. What are those allegations?

Mr. Bailey: I included those under the statement that it was an arbitrary, capricious and unjust act, because it was a conspiracy.

The Presiding Judge: I mean, is there any allegation with reference to that matter which is specific and will require proof, or just an inference from general facts which you allege?

Mr. Baliey: No, it will require proof.

The Presiding Judge: What do you allege as to what the conspiracy is? What are the facts about it?

Mr. Bailey: It is a conspiracy to limit the production of oil in the United States.

The Presiding Judge: And you allege that these persons entered into a conspiracy to limit the production of oil in the United States?

Mr. Bailey: Yes, sir, and I set out verbatim the very agreement which Governor Sterling signed to do so.

[fol. 228] The Presiding Judge: Now, what is that allegation?

Mr. Bailey: What is that, sir?

The Presiding Judge: What is that allegation?

Mr. Bailey: Well, the allegation is that Governor Sterling participated in what is known as the Oil States Advisory Committee and its proceedings; the Oil States Advisory Committee contained among others a representative of the Governor of the State of Texas; they got together, declared what the oil industry needed and what it did not need, and what production they wanted, and how they were going to arrive at it, and apportioned it among the states, and determined the total amount for the United States.

The Presiding Judge: What I am trying to get at is this: is that you are claiming—you are claiming the same kind of conspiracy that the Attorney General is claiming?

Mr. Bailey: No, sir.

The Presiding Judge: In his suit against all the oil companies?

Mr. Bailey: No, sir.

The Presiding Judge: They made an agreement with the A. P. I. or the A. P. A.?

Mr. Bailey: American Petroleum Institute, A. P. I.

The Presiding Judge: Will there be an issue of fact there?

Mr. Bailey: Yes, sir.

[fol. 229] The Presiding Judge: As to what occurred, or does that issue arise on the agreed statement of what the facts are and it is just a question of an inference from those facts?

Mr. Bailey: It probably would not arise on an agreed statement, because I doubt if the other side would agree to the facts, but it arises on documentary evidence that will be introduced in this case.

The Presiding Judge: The documentary proof, you contend, will establish the allegation you make that there was an agreement entered into?

Mr. Bailey: That is correct, and that would have its bearing upon whether or not the action of the Governor was controlled in accordance with the discretion which was vested in him or, for the purpose of this very agreement.

The Presiding Judge: There are no allegations of a fraudulent conspiracy, but the allegation is that this was done for the purpose of conserving the oil industry, and these people all got together to do it.

Mr. Bailey: Yes, sir, no fraud in it. For the purpose of controlling the price.

Mr. Smith: The answer of these defendants very briefly is that last August the Governor had information and advice from persons upon whose credibility he relie*f*, that there was imminent danger of insurrection, riot, tumult, and general disorder in the four counties in East Texas [fol. 230] now in the military district. The Governor determined in the exercise of his discretion that it was necessary to declare martial law in that territory, and he did so. Thereafter, this Act of the Legislature which had previously been enacted, I believe, but was not in effect at that time, became effective, and the Railroad Commission entered the order first fixing the allowable at 225 barrels per day. The Governor, along with the enforcement of all other laws in the military district, proceeded to cause this order to be enforced, which was made and entered pursuant to this proration law; that the Railroad Commission thereafter reduced the amount of the allowable to 165 barrels per day, and the Governor enforced that order of the Railroad Commission. On the 13th day of October, I believe is the date, this Honorable Court issued an injunction restraining the Railroad Commission from further enforcement of the allowable of 165 barrels per day in so far as these plaintiffs were concerned. This injunction included the Railroad Commission, the Attorney General——

Judge Bryant: Mr. Smith, let me ask you a question right there. Do you allege in your pleadings, as a fact, that the military forces were actually engaged at the time of the issuance of that order, in the enforcement of the orders of the Railroad Commission?

Mr. Smith: Not specifically, no. They were merely carrying it out.

[fol. 231] Judge Bryant: Well, is that a fact?

Mr. Smith: I just could not state on that.

Mr. Bailey: I think, if I may be permitted to state so, that that is the allegation, that they were engaged in enforcing the orders of the Railroad Commission.

Mr. Smith: The answer will speak for itself.

Judge Bryant: I just wanted to get that one fact stated clearly.

Mr. Smith: Now, on the 13th day of October the Railroad Commission, having been enjoined from the enforcement of this order, the Governor then, under his general powers to enforce the law, being advised prior to the entering of that order that in the event the Railroad Commission orders were not enforced that there would be immediately great destruction of property by the land owners and other interested parties in East Texas because, immediately, according to information he had upon which he acted, all of these oil wells would be opened up and the price would again go down, and conditions would then again arise which existed in August at the time martial law was declared.

Judge Bryant: Now, at that point, had his previous proclamation of martial law made in August after the passage of this legislation, expired or been terminated or abrogated in any way, or was it still in existence?

Mr. Smith: Oh, it was still in existence; there was never [fol. 232] any abrogation of martial law at all. Now, in order to prevent these terrible conditions of fire and the use of dynamite in blowing up these wells, we were faced with real facts and not theories, the Governor believed it was, he had information and advice to that effect; he instructed, by written order, the commanding General of this military district not to enforce the Railroad Commission's orders, but to hold down the allowable as a preventative measure against this existing insurrection, to suppress the insurrection and prevent further acts of insurrection. That, according to the allegations of the answer, was the purpose and intent of the Governor in issuing this order. Thereafter the allowable was further reduced until it is now 100 barrels per day. And again, with the same intent and purpose of enforcing law, not the proration law of Texas, but enforcing the laws of Texas in this military district, and in order to suppress and prevent the then existing insurrection, riot, tumult and general disorder, and to preserve and maintain peace in this East Texas Oil Field. That, may it please the Court, are the allegations upon which these defendants rest, and they deny, of course,

under oath, specifically, that there was any such conspiracy as is alleged against them.

Judge Bryant: Let me ask you this question: isn't it a fact that those subsequent orders of the Governor reducing [fol. 233] the allowable for these wells below that provided by the orders of the Railroad Commission, were incident to the drilling of new and additional wells within that field and if they did not have the effect, whether it was the necessary purpose and intent, of maintaining the fixed allowable of 400,000 barrels which had been the figure maintained by that field all along?

Mr. Smith: I know nothing about any such fixed allowable as 400,000 barrels; that is news to me.

The Presiding Judge: The pleadings do not make any statement of that kind?

Mr. Smith: I believe the plaintiff alleges that this conspiracy was to the effect that the allowable would be reduced or maintained at 400,000 barrels.

Judge Bryant: Here is what I am asking, Mr. Smith, if you deny, regardless of what you claim as the inspiration for these orders of the Governor, do you deny as a matter of fact that the practical effect of those orders as of the date of their issuance, considered in relation to the number of wells in the field, was not to maintain the production at approximately 400,000 barrels?

Mr. Smith: We allege this, that the matter of production did not enter into the purpose and intent of the Governor in entering any of these orders; it was purely a question of preventing insurrection.

[fol. 234] Judge Bryant: I am asking if you deny that the effect of those orders was that practical effect.

Mr. Smith: I don't know as we do deny it, except our affirmative allegation shows clearly the intent and purpose of the Governor. We have no hesitation in denying it because it is not a fact. I believe that states our answer, may it please the Court.

The Presiding Judge: I don't see how we are going to come to any reasonable conclusion on the basis of the pleadings as you all state them, as to what the situation is, because plaintiff says that his pleadings allege that you are trying to enforce a law of the State which he says is invalid and you say you were not trying to do anything except stop riot, and we will have to see what you are

trying to do, and I think a general argument that the Governor had the power to call out the militia to prevent insurrection or riot would just be a waste of time because everybody knows that. This is not a general question of whether troops should be called out and put in charge of the situation, nor do I even think it is a question—it doesn't seem to be—where the motives of the Governor are important. The plaintiff claims they are, and we have got to go over it, I suppose, unless we short cut that by argument. My personal opinion is, and I think the judges probably agree with me, that the motive of the Governor hasn't got much to do with this question, and you need [fol. 235] not take much time on that proposition, but the others may not agree with me. I think the real question in the case is, what is he doing up there; whether he is up there to enforce the law or to enforce anarchy, and if he is up there to enforce anarchy, I don't believe he has got a right to be up there. That is my off hand view. If he is up there to overthrow the Constitution and laws, the fact that he is Governor doesn't make any difference. If he is up there to enforce the laws, I think he has a right to be up there, but it seems to me what we ought to really find out is what is he doing up there. If the Legislature had passed a law and the Governor had conceived that my house was not a satisfactory place for me and he would like to have it and he sent the Commission down here and took mine and yours and everybody else's, I don't believe that he could declare martial law and prevent the courts from inquiring into whether or not that was the law that he was enforcing, because what he is authorized by the Constitution and laws of the State of Texas to do is to enforce the laws of Texas, but not to enforce anarchy and disorder, not to take people's property and deprive a whole section of what is theirs. That is my off hand view of the law. Now, it may be that the Governor can do what you say. It may be that the Legislature can pass a law expropriating all the property of every colored man in Houston because that is a desirable idea, and the Governor, of [fol. 236] course, would find a riot on his hands in enforcing any such a law and would find many a man of my disposition in the riot on the colored side.

Mr. Smith: Well, this thought——

The Presiding Judge (interrupting): Let me get the thing clear; we don't want to waste time in the brush on those questions. If your contention is, and you can maintain it, that the Governor has a right to put the militia into a territory to expropriate the property of all the citizens of that territory either because he thinks that that is a good thing to do, and because he has made up his mind to do it and put the militia in, the courts can not inquire into whether or not he is acting in accordance with law or contrary to law, then I would like to hear argument on that to settle it. If the Governor is above the law, and by reason of calling in the military can transcend the law by creating laws for himself, legislating as he goes, why, I think that there is nothing for us to hear here because the Governor has done it.

Mr. Smith: May it please the Court——

The Presiding Judge (interrupting): But then to my mind too, if, as I believe the law to be, martial law or military law——

Mr. Smith: Well, there is a very great distinction; don't get confused in the two terms.

[fol. 237] The Presiding Judge: Well, I think you should assume that the Court has half as much intelligence as you have and is not any more likely to be confused on it than you are; we will go on that assumption.

Mr. Smith: All right.

The Presiding Judge: Whatever may be the law, that the Governor under the enforcement of that thing which he is doing has got to obey the law and enforce the law, and not destroy the law; that is my idea. I don't think the Governor under military law or any other kind of law, martial law, military law, or insurrection, can absolutely destroy the property of citizens merely because he has declared martial law, and the courts have the right—that is my impression—to inquire into whether the Governor is enforcing the law or destroying the law. Now, if you say you can not inquire into that, all right, we will hear you.

Mr. Smith: I want to state very clearly, if I may, and I don't want to appear egotistical about it, it so happens that martial law has been something of a hobby with me in the examination of questions historically as well as in my professional work. Beginning back in 1920 I had more or less to do with the enforcement of martial law, and I will state

to the Court what the law is as it has been declared to be by the courts.

The Presiding Judge: Counsel, I don't think we would [fol. 238] take the time now to hear that dissertation.

Mr. Smith: Briefly, I would like your Honors to hear me, because I think your Honor has got a misconception of martial law at the beginning of this lawsuit, and I would like to state very briefly what the law is. If your Honor does not care to hear me——

The Presiding Judge: I would like to hear what your contention is. Just state what your contention is.

Mr. Smith: If you will give me time I will be glad to do it.

The Presiding Judge: You don't have to state what courts have stated, you can say what you think.

Mr. Smith: All right; I will be glad to. I am going to do the best I can either in argument or on the facts to try this case, and not some supposed case. Now, the law is this, and our contention is that: that the Governor and the President, and there is no distinction between the two, has the power because the discretion is vested in him, to declare martial law whenever in his judgment it is necessary to do that in order to protect the people in their rights of life, liberty and property. Having done that, and having declared martial law, and having placed the soldiers in the field, and that must be done, soldiers must be there according to the decisions, and having placed the soldiers in the field then the discretion is in the Governor as to what acts [fol. 239] he shall do in order to enforce the law by the military, and that discretion is not vested in the courts and the courts can not inquire into the exercise of that discretion.

The Presiding Judge: You take the position just the contrary to the one I stated; I would like to hear the law on that.

Mr. Smith: Yes, sir, I will be glad to state it to you.

The Presiding Judge: Point me to a decision; discuss decisions which hold that the Governor may, under military law, violate the law with impunity.

Mr. Smith: Of course, I am not going to be driven to any such position as that, your Honor, and if you expected me to make an argument that the Governor may violate the law, then I am not going to make it.

The Presiding Judge: Well, he may if the courts can not correct him.

Mr. Smith: Well, there is where we widely differ.

The Presiding Judge: Now, where do we differ.

Mr. Smith: Because the people through their Constitution have vested in the President and the Governor as one department of the government, certain discretions and powers, and have vested in the judiciary certain other powers. The executive power, which must enforce the decrees of the courts, can not inquire into the motives or any [fol. 240] other things pertaining to the judgments of the courts. Now, the Constitution has vested in the President and in the Governor the power to make certain judgments, to exercise discretion, and that judgment can not be inquired into by a coordinate department of the government.

The Presiding Judge: Mr. Smith, you may be entirely right; I am just giving you my impressions like you are giving me yours. I just want to get, for the purpose of coming to an understanding, just how far you go. Do you go to the point that it does not make any difference what is going on up in the field, what the Governor is doing up there, therefore the facts are immaterial; he has got a right to go up there and raid every man's house, burn up every man's property, and as far as the courts are concerned they can not inquire into it?

Mr. Smith: I won't be driven to that position, your Honor. I am going to rely on what is before the Court. I say that this petition does not state any grounds upon which a court can make inquiry.

The Presiding Judge: Well, you mean that it would not be done?

Mr. Smith: Don't misunderstand me. A Governor is not above the law, and the President is not above the law. This is a government of law and not of men; but they have certain powers vested in them and they exercise those [fol. 241] powers at their peril as other citizens do. Now, there is a remedy and people have that remedy, and I will state this, there are three remedies against the abuse of this great and extraordinary power of martial law. First, after and not while it is going on, after martial law has terminated, a citizen who feels himself aggrieved at any action of the Governor or the President, may bring a suit for damages for any injury that he has received. That is

the remedy of the individual. Now the remedy of the Government is two-fold; first, in order to protect the public if the President or a Governor violates this great power that must be vested somewhere and has been invested in the chief executive, then and in that event, of course, he may be impeached and removed from office.

The Presiding Judge: What is this power? To do what?

Mr. Smith: Cause the laws to be faithfully executed.

The Presiding Judge: That is exactly it. But suppose *he* violates the law; is he causing the law to be executed?

Mr. Smith: No, but the remedy is not in the courts but, as I am stating, and they are the only remedies——

The Presiding Judge: If he has no power except to enforce the law, and he undertakes to violate laws, can't a court say "Why, Mr. Governor, as far as keeping the peace, as far as preserving life and property, as far as preventing injury, disorder and riot, we have nothing whatever to do, [fol. 242] but if you undertake, not to enforce, but to violate the law, we have a right to restrain you." You say the Courts can't do that?

Mr. Smith: Let's get down to the facts stated in this case as stated by the allegations of the plaintiffs' bill.

The Presiding Judge: All right.

Mr. Smith: They say that the Governor has abused this great power; first they say he hasn't the power, but I pay no attention to that, that is not the law; they say first that he has no such power, and second, that he has abused the power and violated the law in doing what? In reducing and causing to be reduced the production of oil.

The Presiding Judge: No, in preventing them from producing their oil, and he is not the Governor when he does that.

Mr. Smith: The Governor says, "It is necessary for me to cause this oil production to be restricted to the amounts I have fixed in order to suppress this existing insurrection and prevent the further acts of insurrection." There is where we come to the exercise of discretion and judgment on the part of the Governor. Is this Court, or any court, or is the Governor, or in a proper case, the President, to determine whether or not that is a necessary procedure to take in order to cause the laws to be faithfully executed? That is the point.

[fol. 243] The Presiding Judge: Does the Governor take the position before the Court that he is not concerned at all with the production of oil, and that he is up there because people are rioting and he is just stopping this production of oil, not because it has anything to do with the oil industry, but just because people will go to shooting each other if he doesn't do it?

Mr. Smith: That is the sworn pleading, if your Honor please.

The Presiding Judge: Is that so?

Mr. Smith: Yes, sir.

The Presiding Judge: All right.

Mr. Smith: Now, going back to these remedies: the public has a third remedy, and it is this, as far as the Governor is concerned of any state. The Constitution of the United States guarantees each citizen a republican form of government, and our Supreme Court away back in the old Rhode Island case of Luther vs. Borden——

Judge Bryant (interrupting): Do you claim that that case intimates in that opinion that the Governor is not accountable for any abuse of means necessary to the enforcement of proper laws?

Mr. Smith: Here is what the courts have said——

Judge Bryant: I am asking you about that opinion; [fol. 244] what is your interpretation of it?

Mr. Smith: I have read so many of these decisions I won't attempt to specify this particular decision, but here is the general statement, and I think it is in that case: a Governor who abuses this extraordinary power that is vested in him is liable for both civil and criminal prosecution. Now, that is the law; but to enjoin the Governor from the exercise of his discretion or, after he has exercised his discretion and has determined, exercising the discretion vested in him by the organic law of the nation and of the state, that it is necessary, in order to suppress this insurrection and prevent the further acts of insurrection, to restrict the production of oil on plaintiffs' property, this Court has no such power, and no court has. It is clearly an invasion by the judiciary of the executive department of the government.

The Presiding Judge: The federal Constitution and the federal courts are set aside by the Governor's action in

going into a territory and expropriating property of people living there?

Mr. Smith: No, sir, that is not my contention at all; you can not set something aside when it never did exist.

The Presiding Judge: The federal Constitution does not exist?

[fol. 245] Mr. Smith: Very much so, but the federal constitution has not vested even in the federal judiciary the power to substitute its judgment for that of the chief executive of the state when he is causing the laws to be faithfully executed.

The Presiding Judge: You, of course, admit that if the Governor had not gone through the form of calling out the militia, that his actions would be subject to judicial review, don't you?

Mr. Smith: Well, why should I admit that? I want to try this case on the pleadings as they are, and I am not going to go up some blind alley on a supposed case.

The Presiding Judge: All right; go ahead and I will give you thirty minutes and you can finish. I will give you thirty minutes to state the case because you don't want to *do* up any blind alleys.

Mr. Smith: I believe the case has been sufficiently stated so that the Court clearly understands the issues before the Court. Our position is simply this, point by point: martial law is the will of the commanding officer. That sounds like a harsh statement, but it is the law as declared by court after court. It has to be the law. Now, then, it being the will of the commanding officer, he determines that it is necessary in the exercise of this great discretion that is vested in him to restrict the production of oil on plaintiffs' [fol. 246] property. Now, we assume that plaintiffs are engaged in a lawful business; that they have a right, a legal right, a constitutional right to produce all the oil that their wells are capable of producing. We assume that. Now, then, an emergency exists; martial law is never of long duration. It is nearly always of a very few weeks or a very short time. Now, is this constitutional right to produce oil superior to the supreme police power of the nation and of the state? The Governor has found as a fact, and this Court will not go behind that finding, that an insurrection existed in these four counties of East Texas. The

Governor has found as a fact that in order to cause the laws to be faithfully executed he must declare martial law and place the military in those counties, and he has done that. The Governor has found as a fact in the exercise of discretion vested in him, that it is necessary to restrict for the time being the exercise of this legal right, this constitutional right of plaintiffs to produce oil, and that is precisely what he is doing. They come in and seek to restrain, through this Court, the Governor of Texas from doing that which he, in the exercise of a judgment vested in him as chief executive of the state, the restriction of this oil, not in order to prevent the production of oil as such or to hold down the amount of oil produced to any arbitrary figure, but in order to maintain law and order in East Texas, to suppress existing insurrection and prevent further acts of [fol. 247] insurrection. We think that the Supreme Court of our nation, in an opinion by that great jurist, Judge Holmes, has clearly stated the law that governs and controls this case. In that case a man by the name of Moyer was a labor leader living in a state other than Colorado. There were labor difficulties in the state of Colorado. A strike existed. The Governor conceived it to be his duty to declare martial law in that state, and did so. The Governor caused Mr. Moyer to be arrested as far as the record shows in the reported case, without the commission of any overt act whatsoever on the part of Mr. Moyer. The Governor conceived and believed that Mr. Moyer, so long as he was at liberty, constituted a menace to the enforcement of the law by him as chief executive of the state, and he caused this man to be arrested, confined and deprived of his liberty during the existence of martial law. After martial law had terminated, after the Governor had retired from office as chief executive of the State of Colorado, Mr. Moyer, being a citizen of another state, instituted suit against the Governor and other former officials of the State of Colorado for damages. And what was the basis of his suit? He had been deprived of his liberty, so he alleged, without due process of law. Now, that is the contention of plaintiffs in this case, that they are being deprived of their property without due process of law. Here is the illustration that Mr. Justice Holmes made in passing upon that case: the case went off on the ground that the suit was not maintainable at all, and

[fol. 248] the Supreme Court affirmed the action of the district court in dismissing the suit. Now, in illustrating the point, Mr. Holmes used this illustration of a captain of a ship at sea. From the time a ship leaves its port until it reaches another port, the captain of that ship is the supreme law in so far as that ship is concerned. His will is law. After he reaches port then, of course, any actions that he may have committed in violation of the law while his ship was traversing the high seas, he is accountable for those acts. But so long as the ship is at sea he is the law. During martial law, during the existence of martial law, the Governor's will is law. He is not above the law. If he makes the mistake—that is not a correct statement. If he wilfully, is the language of the decisions, injures some citizen through the exercise of this great and arbitrary power that has been vested in him, then and in that event, after martial law has terminated, the Governor is responsible for damages done to any citizen, and is responsible to the people of the state, and may be impeached and removed from office if he has wilfully abused the great power vested in him. First, if the Governor of Texas should declare martial law over a wide extent, or the entire territory of the state of Texas, and exercise that power in such a way as to deprive the people of Texas of a republican form of government, then and in that event Congress or the President [fol. 249] or Congress and the President may, of course, intervene in order to carry out the guarantee of the constitution that the people of each and every state shall have a republican form of government. Permit me to carry the illustration a little further. I shall furnish the Court, with its permission, a short printed brief we have here of all these authorities, and I will not abuse the privilege of the Court by reading these decisions at this time.

The Presiding Judge: Counsel, I would like for you to conclude in ten minutes more, if you please. We would like to go on with the case.

Mr. Smith: I will, and I should be glad to conclude my argument now, if your Honor please.

The Presiding Judge: The cases decided have all been read by every member of the Court I suppose, and if your point is where we go, why, we have to decide nothing; there is nothing to consider. We had just as well close

the case. I think it is perfectly clear what you contend, that there are no facts which make any difference at all. If we decide that, that ends the case.

Mr. Smith: We think, your Honor, and I say it with the utmost respect, and if I have in my remarks offended your Honor, I desire to apologize, because I say to you that personally and as a judge——

The Presiding Judge (interrupting): You haven't offended me; you have just prevented me from finding out [fol. 250] what you are talking about by not letting me ask you questions, that is all.

Mr. Smith: I didn't intend to do that; I thought your Honor was trying to get me committed to propositions which I could not concede for a moment.

The Presiding Judge: Oh, no.

Mr. Smith: I believe I have stated the case to your Honor, and your Honor has gotten before you the contentions.

The Presiding Judge: I should like to say to you that if I have offended you, why, I haven't meant it. I like to see how far a man will go in his admissions, until I see where I will part company with him; that is what I was trying to do, but you prevented my end in an effort not to pay any attention. I will do this, with any member of your staff that likes to engage in a Socratic dialog, in this case, I will keep quiet.

Mr. Smith: Let me see if we are agreed on the issues of this case, that is, whether or not the Governor in the exercise of what he believes to be a necessary act on his part in order to enforce the law, has the power to deprive these people of their constitutional right to produce oil without limit when he believes that the production of such oil will bring about widespread riots, tumult and disorder, may he through the emergency suppress that?

The Presiding Judge: If you will let me state what I [fol. 251] think you said, without thinking I am trying to misquote you, I will do it, so I may be sure I understand.

Mr. Smith: I will be glad for you to do it.

The Presiding Judge: I understand your position to be that the Governor has declared a state of insurrection to exist in a certain territory, that he has occupied that territory with a military force, that he has put the commanding General in charge of that territory who thereby, without

any further instructions, the commanding General has the power to take such steps as are necessary to suppress insurrection and bring about peace.

Mr. Smith: Now, pardon me just a moment, if I may interrupt you there to get the facts clear. The Governor has issued a written order in each of these instances reducing the production of oil.

The Presiding Judge: I don't think that makes any difference.

Mr. Smith: I don't think so either.

The Presiding Judge: It seems to me that the commanding general—I don't think the Governor has much—he is acting as Commander in Chief and not Governor when he tells the General what to do, but I will say I don't think it makes much difference. The Commanding General and the Governor have issued these military orders, the Commanding General and the Governor have issued these [fol. 252] orders, you say, not with the idea of enforcement of any of the state laws, whether for oil conservation or otherwise, but because of an inflammatory condition which he finds there, and for the emergency, that these orders are necessary to keep the peace.

Mr. Smith: Yes, sir.

The Presiding Judge: That is what you claim?

Mr. Smith: That is it exactly.

The Presiding Judge: And you analogize this to an order of the Commanding General to shoot somebody when he can not stop the rioting otherwise, and tear down a house in order to stop a conflagration or something like that. You think these are all conflagratory orders that are being issued in the midst of a conflagration or excitement?

Mr. Smith: It is the exercise of the supreme police power in order to preserve the government itself. That is what it amounts to.

The Presiding Judge: You think the fact that they are issued upon that pretext or ground or theory, that they can not be inquired into at all as to whether that action is really done for that purpose or some other purpose, or whether it is really necessary or proper to effect that end?

Mr. Smith: Yes, sir, because the discretion of determining whether or not it is necessary is vested in the Governor and not in the courts.

[fol. 253] The Presiding Judge: I would say that you have given a turn to the case that I didn't think would be in it, because I thought the facts were different, that the Governor was not concerned at all with the matter of production or conservation of oil, that he was only down there preserving the peace. I thought all the time that the case presented itself to me as a case where the Governor goes in and out with the Commission, was trying to enforce the state conservation laws, but you now claim that he is not trying to enforce them at all.

Mr. Smith: He is not, your Honor, it is purely a matter of maintaining peace. That is the proposition. Now, of course, the production of oil out there, I think we understand each other there, the production of oil and the economic situation may have been the cause of the riot and the Governor, we think, of course, has the power, in order to prevent the insurrection, of removing the economic trouble, but we are not concerned with that issue. Our position is strictly this, that the Constitution, state and nation, I will put it that way, necessarily carries with it by express or implied powers to the Governor and to the President, of exercising the determination and discretion of forming a judgment which is conclusive as to whether or not it is necessary in this very case to restrict oil in order to suppress and prevent insurrection.

The Presiding Judge: That is a very shrewd and cun-
[fol. 254] ning statement of the case, I will say that.

Mr. Smith: Well, I don't think that anything that I have said—again, I don't want to be offensive, but the word "cunning" or "shrewd", I don't think either has anything to do with it.

The Presiding Judge: You don't think so? Do you want to hear from the other side, or do the judges want to retire and confer?

(Conference of the judges.)

The Presiding Judge: We will confer and then go on with the evidence in the case. I would like to have some understanding about the evidence, as to getting it in, so we can get through with the case. What evidence does the plaintiff expect to have, what witnesses?

Mr. Bailey: If the Court please, that will largely depend upon the latitude which you will allow. Now, we have alleged the ownership of certain properties.

The Presiding Judge: I suppose that will be agreed.

Mr. Bailey: They have not denied it except to say they have no knowledge; those sort of things we would not take up the time of the Court in cluttering up the record with. That being true, we will have only the testimony of our depositions and very little of that.

[fol. 255] Mr. Moody: We make no controversy about the ownership of the property.

Mr. Bailey: Did you get that, Mr. Reporter, they make no controversy about the ownership of the property?

The Presiding Judge: What evidence will the defense have? I don't suppose you will have any evidence, will you?

Mr. Moody: If your Honor is going to inquire into the matter, why, yes, your Honor, we have some forty or fifty witnesses here.

The Presiding Judge: Well, you will have to select from those forty or fifty the ones which you think will be material, because the Court is not going to take time with a lot of cumulative testimony. Present the testimony of any one witness and if not disputed that will probably be enough. If they dispute it, you can fortify it by other witnesses. There is no jury here and you can move the case along. What, in your estimation, will be the duration of the testimony on the plaintiffs' statement that he has just got some depositions, and small testimony; how much testimony do you think you will have in time?

Mr. Moody: Are they going to read the depositions?

The Presiding Judge: No, they will state the substance of them.

Mr. Moody: Then I think about three or four hours; it [fol. 256] will be very brief.

The Presiding Judge: Oh, is that so; very brief? Go ahead.

Mr. Bailey: Before going to something else, Judge Bryant asked a question which I think perhaps I ought to answer. In going back, you remember the question as to whether or not the military authorities were enforcing the Railroad Commission's orders prior to the 13th day of October, and I stated at the time that I am sure that the answer specified that they were. On page 24 of their answer, in paragraph E on that page, it will be found where the answer states that on October 13th the defendant Jacob

F. Wolters ceased enforcing any orders of the Railroad Commission, and from that time on—and prior to that time he had enforced all orders of the Railroad Commission. I merely wanted to make that statement. Now, one thing further in the statement of the case, that there has been no question about a 400,000 barrel allowable. That will probably come up in our statement of our case, and in the introduction of our pleadings, but I want to call the Court's attention to page 29 of the answer of the defendants, General Wolters and others, to the effect that the people of Upshur, Gregg and other counties became excited and alarmed on the 13th day of October, and inclined to take the law into their own hands, that they believed that if the East Texas Oil Field were permitted to produce in excess of [fol. 257] 400,000 barrels of oil per day, or if any particular well was permitted to produce an excessive amount, that these folks would feel that the field was being exploited recklessly, and so forth, and that was the basis for all the orders that the Governor has promulgated in attempting to limit it to 400,000 barrels. I might call the Court's attention to the fact that the original bill in this case asserts under oath that that was the limit, and was intended to be the limit for the field by the Railroad Commission, and that that allegation is not denied and stands confessed.

If we may then proceed, the complainants would like first to introduce the supplemental bill in this case, and without intending in any way to read it, if I may be certain that all of the allegations will be brought out, I should like to take the time, or a little time, to state paragraph by paragraph in my own words what I think the bill attempts to bring out.

The Presiding Judge: Haven't you done that in your original statement of the pleadings?

Mr. Bailey: My original statement was very sketchy.

The Presiding Judge: This is the pleading in reply to the defendants' pleading?

Mr. Bailey: No, sir, that is purely a matter of law and alleges no facts; I don't think it would particularly do the Court any good to even read that. All I want to do is, [fol. 258] I alleged no facts in connection with my statement before the Court; I simply said it was arbitrary, capricious and unjust, and the facts with which I will attempt to show that are alleged here and I would like to

get permission to fully disclose all there is in this bill to the Court.

The Presiding Judge: You have got to do more than plead it; you have got to make some proof of it. Why can't you just tell us the basis of your charges, and then as you present your proof you can——

Mr. Bailey (interrupting): My understanding is that this being a sworn bill, on the temporary application there is no particular necessity for us introducing proof other than the bill, and we will rebut their testimony; that is what I would prefer to do, because then I will know what they are going to object to.

The Presiding Judge: Have they denied the allegations of your bill under oath?

Mr. Bailey: In certain specific instances, but those are very few, and they have denied more the inferences than the facts.

The Presiding Judge: Well, this is a case on temporary hearing, isn't it?

Mr. Bailey: Yes, sir.

The Presiding Judge: Have the parties prepared affi-
[fol. 259] davits or are they expecting to offer oral testimony?

Mr. Bailey: Well, we prepared ours in the form of depositions, if the Court please.

The Presiding Judge: We wouldn't want to hear any great oral testimony, but if it is only three or four hours it wouldn't make any difference. Ordinarily we try these cases on affidavits.

Mr. Bailey: Yes, sir.

The Presiding Judge: Go ahead, state it the way you want to do it, but just remember we have to hear the same thing twice, and we don't want to hear it too long at any one time.

Mr. Bailey: I shall endeavor to leave out everything I can. My attention is called to the fact that, for the purpose of the record, I called this some other word; it is an amended bill and we are offering it for the purpose of the record as an affidavit of fact.

(Counsel for Complainants then stated to the Court the substance of the allegations in plaintiffs' amended bill of complaint, which bill of complaint appears in this record

on pages 29 to 71. During the course of counsel's statement, the following interruption occurred:)

The Presiding Judge: May I interrupt you again? I understand these allegations which you are now offering by affidavit, are they, any of them, so far denied or are they [fol. 260] matters which are not disputed?

Mr. Bailey: So far, if I am not mistaken, the only answer has been that there has been no knowledge except as set out in the answer. Now, there is one denial. We allege that the acts of the Governor and the Railroad Commission, were in purported compliance with the act of August 12th, and they deny that they were in purported compliance, and affirm that they were in actual compliance, but outside of that, sir, without any material difference at all, the only allegation has been that they have no knowledge except as set out.

(The statement was then concluded.)

(Complainants then introduced, for the purpose of the record, their supplemental bill, which is found on pages 74 to 82 of this record.)

(Complainants then introduced in evidence the following portions of a letter of Governor William H. Murray of Oklahoma, to Governor R. S. Sterling, which was identified by Governor Sterling in his deposition:)

"State of Oklahoma, Executive Chamber, Oklahoma City

William H. Murray, Governor

February 5, 1931.

To His Excellency the Governor of Texas, Austin, Texas:

My Dear Governor: As you perhaps realize, the oil business is in the 'dumps' which greatly affects labor and the increase of the unemployed. Oklahoma has a form of proration, more or less just, and more or less operated with [fol. 261] some favoritism. We have a contest on between those who want to maintain proration and those who want to take the lid entirely off, both partly right and both are wrong. The real trouble with proration in our state is that our Corporation Commission is under the control of the big interests. * * * I am writing the other states produc-

ing oil, including Louisiana, Arkansas, Kansas and Ohio, with the hope of getting them to join with Oklahoma, California and Texas. If you feel your way clear to send such representative, my suggestion is that he come to Oklahoma City on the 14th of this month for such conference. With salutations and best regards for yourself and successful administration, I remain,

Yours sincerely, William H. Murray, Governor."

(Complainants then introduced in evidence the reply of Governor Sterling to Governor Murray, which was identified by Governor Sterling in his deposition as a duplicate copy of the original letter which was sent to Governor Murray, the letter being dated February 12, 1931, and the pertinent portions thereof being as follows:)

"To His Excellency the Governor of Oklahoma, Oklahoma City, Oklahoma:

My Dear Governor: Your letter of the fifth was received in due time, enclosing proposed bill that you are endeavoring to have passed by your Legislature". * * * "I see no reason why the several states that are producing the greater proportion of the oil in this country should not cooperate in order to prevent the enormous over produc- [fol. 262] tion. The State of Texas, through the Railroad Commission, would be glad to confer with the delegated authorities of other states with this object in view.

Cordially yours, —— ——."

(Complainants then introduced in evidence from the deposition of Governor Sterling, the following exhibit, which is the agreement made at the Fort Worth meeting on the 28th of February, 1931:)

"It is agreed by, between and among William H. Murray, Governor of Oklahoma, and Honorable Ross Sterling, Governor of the State of Texas, and the representatives of the Governors of the States of Kansas and New Mexico, assembled at Fort Worth, Texas, for the purpose of discussing the conservation of crude petroleum and natural gas, and to bring about concerted action on the part of all oil producing States, to conserve the natural resources of such States:

"That the Governor of each State here represented shall immediately appoint a representative on a committee to be styled the Oil States Advisory Committee;

"That the other oil producing States be invited and requested to take similar action, and to join with these States in the conservation program;

"That such organization so formed shall immediately take such action as may be necessary to recommend and sponsor such necessary legislation for all oil producing States as may be necessary effectually to conserve to these [fol. 263] States their natural resources, for the benefit of the public and posterity, such legislation to be as nearly uniform as practicable.

"Wm. H. Murray, Gov. of Okla. R. S. Sterling, Gov. of Texas. Alfred Landon, Representing Governor Harry Woodring, of Kansas. E. H. Wells, Representing Governor Arthur Seligman, of New Mexico."

(The complainants then introduced in evidence from the deposition of Governor Sterling, copy of the telegram which was forwarded from the Fort Worth meeting just referred to to the Honorable Herbert Hoover, President of the United States, dated March 1st, which is as follows:)

"We the Governors of Oklahoma and Texas and representatives of the Governors from Kansas and New Mexico in conference here Saturday to work out stabilization plans for the oil industry urge you to call a conference of the major companies importing crude oil and its refined products to meet with the Oil Conservation Board and the Federal Trade Commission for the purpose of limiting their imports stop We are dealing with a grave emergency in the oil situation now existing and appeal to you as President to urge an immediate agreement by these importers with the sanction of the various Federal authorities.

"Governor Ross Sterling, Texas. Governor Wm. H. Murray, Oklahoma. Alfred Landon, Repre- [fol. 264] senting Governor Harry Woodring, of Kansas. Dr. E. H. Wells, Representing Governor Arthur Seligman, of New Mexico."

Honorable R. S. STERLING then testified by deposition as follows:

I requested Robert Penn to represent me at a meeting that was to be called later. That was an oral request and later on, I think, I wired the Chamber of Commerce at Texarkana that Penn was my representative. I don't remember whether the meeting that I refer to was at Texarkana on the 9th of March, as I don't remember the date, but it was shortly after the date of those telegrams that that meeting occurred. I think I received a report of that committee meeting. I don't appear to have it here, but I am sure that I received a report written, I think, by the man who was acting as Secretary, Mr. David Donahue, I believe, or it might be that Mr. Penn made the report.

(Complainants then introduced in evidence Exhibit A attached to the deposition of R. R. Penn, which is a report of the Secretary of the Fort Worth meeting, which is as follows:)

"Record of the Fort Worth Meeting

"Meeting of the Governors and representatives of the States of Oklahoma, Texas, New Mexico, and Kansas, held at Texas Hotel, in the city of Fort Worth, Texas, on the 1st day of March 1931

Present: Governor William H. Murray, of Oklahoma; [fol. 265] Ross S. Sterling, Governor of Texas, of the state of Texas; Alfred Landon, representing the State of Kansas; Dr. A. H. Wells, representing the state of New Mexico, and other officials representing the states of Oklahoma, to wit: Paul Walker, Chairman of the Board of Corporation Commission of the state of Oklahoma, and W. J. Armstrong, Chief Conservation Officer of the Corporation Commission; Cicero I. Murray, Governor's personal representative on proration and other matters of the state of Oklahoma; C. V. Terrill, Chairman of the Railroad Commission of the State of Texas; Robert R. Penn, Chairman of the Central Proration Committee of the State of Texas; Edgar DeWitt, Lieutenant Governor of the State of Texas.

"Meeting was called to order by Governor William H. Murray of Oklahoma, motion was made and seconded that

Cicero I. Murray be elected Chairman of conference, no other nominations were made and the nomination was made unanimous.

"After being called to order by the chairman the questions to be discussed were related by Governor, such questions to be discussed primarily conditions in general of the oil industry as it effects the states present and other oil producing states, and the importation of crude oil from foreign countries.

"Governor Murray submitted for the consideration of the members present a copy of a prepared law of Oklahoma to prevent charters from being executed to domestic [fol. 266] corporations providing for cancellation of such charter in the event *in* the importation of foreign crude oil into the United States. It also providing as to foreign corporation that in licenses and permits to be issued by the state to any company engaged in importation of crude oil into this country and in event of the importation of such crude oil into the country thereby any foreign country by such act would work a forfeit of the license or permit of said foreign corporations doing business in any state.

"Thereupon Robert R. Penn discussed the oil industry in general and gave a- outline of the operations of proration laws and rules within the state of Texas, also the manner of payment of administrative expenses, the execution of such law within the state, such fund being raised by a tax of one-twentieth of one per cent the value of each barrel of oil produced within the state same being paid into a special fund and known and used as a- administrative tax for the purpose of enforcement of the rules of the railway commission — proration matters.

"After such discussion a general discussion was had as to the oil industry and proration laws in general.

"Thereafter it was moved and seconded that the conference recess until the following morning where an open hearing on the matters under discussion which motion was duly adopted.

[fol. 267] "Minutes of Meeting of Morning Session of March 1, 1931, Governor Ross S. Sterling Presiding, Cicero Murray Acting as Secretary.

"Meeting was called to order in the Japanese room of the Texas Hotel, Fort Worth, Texas, anyone being present

there so desiring, and whereupon the Chairman announced any persons might be heard on any matter by the conference for discussion.

"Whereupon Mr. Robert R. Penn discussed the matter of the oil industry and proration laws in general also giving the history of proration laws in Texas and other conservation statutes; potential of Texas fields, actual amount which could be produced for long period of time and the actual production of each field separately on this date and closed his remarks with the general situation now existing in the so-called East Texas field.

"Whereupon Mr. Hinds Baker, Attorney for the Humble Oil Company, addressed the conference meeting with the explanation of the legal phases of proration and the operations of the laws and rules made by the railroad commission in the state of Texas.

"Whereupon Mr. Cham Jones, member of the House of Representatives of Oklahoma, addressed the meeting giving his view points in general on proration laws and in opposition of such laws.

[fol. 268] "Whereupon Roy M. Johnson, independent operator of Oklahoma addressed the meeting in a general discussion of proration and conservation laws from the standpoint of an independent operator and being in favor of proration laws as enforced in the state of Oklahoma at this time.

"Whereupon Dr. Loyd of Tyler, Texas, Independent operator, addressed the meeting speaking against any proration laws. Thereupon C. E. Owen of California, addressed the meeting in general on the oil industry in general and the effect of proration and conservation laws as applied in Oklahoma and Texas and making the argument that such laws should be repealed.

"Thereupon Mr. Alfred M. Landon of Independence, Kansas, an independent operator of that state, addressed the meeting, subject of the oil industry in general in application of proration and conservation laws in general making an argument in favor of the proration laws as now — effect and applied in the state of Oklahoma.

"Thereupon Dr. A. H. Wells, representing the state of New Mexico addressed the meeting as to proration and conservation laws and the general situation of the oil industry

within the state of New Mexico and expressed his opinion as being in favor of the conservation laws now enforced in Oklahoma.

"Whereupon the open meeting of proration adjourned.

[fol. 269] "Meeting of the Executive Meeting of Representatives at Texas Hotel, Fort Worth, Texas, on March 1, 1931

"After the general meeting was closed as was set out a-executive meeting was called to order by Governor William H. Murray, of Oklahoma, Cicero I. Murray serving as Secretary.

"Whereupon the discussion was had by the members present being the same present as set out first above that the advisability of sending telegrams to President Herbert Hoover with reference to importation of crude oil from foreign countries and after such discussion it was agreed that such telegrams should be sent on this date and the form of same was drawn and signed by each representative of each state so represented. After such discussion and such telegrams were sent a suggestion was made by Governor Murray of Oklahoma that a representative for each oil producing state be appointed by the Governors of those respective states to originate ideas and plans and to have concerted action on the part of all oil producing states on proration and conservation laws in general and all other matters with reference to said industry in general.

"Whereupon it was moved and seconded that the secretary of the conference draft for its approval an agreement with the suggestion of Governor Murray.

"Thereafter the secretary of the meeting caused to be prepared and presented to said conference a draft of the proposals of Governor Murray a copy of same is hereto [fol. 270] attached and made a part hereof.

"Thereupon it was moved by Alfred M. Landon and seconded by Governor Ross S. Sterling that said draft and agreement so adopted and presented be adopted by the conference whereupon the question was put by Chairman Governor Murray and adopted by the conference by unanimous vote.

"Whereupon a motion was made by Dr. A. H. Wells and seconded by Alfred M. Landon that the meeting adjourn

and thereupon the Chairman William H. Murray of Oklahoma declared the meeting adjourned without date.

"We, W. H. Murray, Governor of Oklahoma, Chairman of the Fort Worth conference, and Cicero I. Murray, Secretary of said conference, do hereby certify the above and foregoing true and correct transcript of the proceedings of the Fort Worth conference called by Governor William H. Murray of Oklahoma."

(Complainants then introduced in evidence report of the meeting of the Oil States Advisory Committee at Texarkana on the 9th of March, being the meeting referred to in the deposition of Governor Sterling, who testified to having received a copy of these minutes, the same being as follows:)

"Oil States Advisory Committee Created

"Whereas, at a conference called by Governor William H. Murray, of Oklahoma, and participated in by Governor [fol. 271] R. S. Sterling of Texas and representatives of the Governors of New Mexico and Kansas, held at Fort Worth, Texas, February 28th and March 1, 1931, an agreement was entered into creating an Oil States Advisory Committee to study the present distressed condition of the petroleum industry and to make recommendations for uniform legislation looking to the relief of said industry and the conservation of oil and gas, and also providing for invitations to be issued to the Governors of other oil producing States to appoint representatives on said committee;

"And whereas, the first session of this committee is being held this March 9, 1931, at Texarkana, Texas, with representatives attending from the states of Oklahoma, Texas, California, Arkansas, Louisiana, Kansas and Wyoming, at which meeting there has been a full discussion of the entire oil situation;

"Now, therefore, said committee hereby adopts the following resolution:

"Resolution

"Whereas the oil industry in the United States and over the entire world is suffering from a general condition of

over-production and slack demand, resulting in depressed prices for crude oil and its products and great distress among all engaged in the industry, including particularly the producers of crude oil as well as those engaged in the refining and marketing business, as well as unemployment and threatened great waste of crude oil reserved by the [fol. 272] forced abandonment of approximately 300,000 small wells in the oil producing areas of the United States alone, forever precluding the recovery of many millions of barrels of oil and thereby wasting a great natural resource;

"And whereas this condition is the result of extreme and uncontrolled competition within the oil industry, resulting in the over-drilling of many areas and a mad race for production on every hand which has built up present potential production of oil far in excess of the ability of the market to absorb same at prices profitable to the producers of such crude oil; such conditions calling for steps by the various legal authorities of the states and of the United States which will permit the oil industry to put its house in order and control its production to fit the market demand;

"And whereas, if present conditions continue unchecked and unabated, they will result not only in the abandonment of hundreds of thousands of small oil wells but in the elimination of virtually, if not entirely, the army of small or independent oil producers in this country, with the survival of only a few of the great major companies, thereby resulting in a condition of monopolistic control of the entire industry, rather than in a desired state of reasonable competition, all of which must be avoided by such control and regulation of the business of producing and handling crude oil and its products as will result in continuing in the busi- [fol. 273] ness independent and major producers and handlers alike;

"And whereas, within the last few years, systems of proration of oil production have grown up within the States of Texas, Oklahoma, Kansas, New Mexico and California, in the effect to hold production of petroleum within the demand, but said proration efforts have failed to result in fair prices for crude oil, said prices having fallen steadily within the last year to such point that a great majority of the oil operators of the United States are now faced with ruin and financial extinction;

"And whereas, concurrently with the development of the proration system, there have been vast increases, within the last five years, in the imports of crude oil and gasoline into the United States, thereby nullifying the curtailment efforts that have been put forth, depressing the market and adding to the distress of domestic producers;

"Now, therefore, be it resolved by said Oil States Advisory Committee that it hereby recommends the following steps to the Governors of the various oil producing states and to the Legislatures thereof:

"Recommendations

"First. That this committee be continued in existence for the purpose of correlating the activities of the various conservation bodies of the oil producing States, in an advisory capacity, and also to make recommendations as to the [fol. 274] amounts of oil which should be produced within the United States and as to the prices which should obtain therefor, so as to assure to all producers a fair and reasonable return on their necessary investments in handling their business of mining for and producing oil; and also to hold conferences and agree with the major purchasers of crude oil as to quantities of production wanted, and prices to be paid therefor, with due consideration to the various grades of oil in the various fields and the geographical locations and conditions of gathering, transporting and marketing such crude oils; and to handle all other matters treated herein.

"Second. That said committee also be empowered to confer with and treat with the major importers of crude oil as imports of crude oil and petroleum products, limiting the same to reasonable amounts with due regard to proration measures in force and to the situation demand and supply within the United States, so that such imports may not result in the pulling down or destroying of the crude oil price structures in the United States.

"Third. That said committee further shall discuss, confer and agree with the various holders of crude oil in storage within the United States as to fair and reasonable schedules of withdrawals from storage of such crude oil, so that such withdrawals may be accomplished in a rational

manner within interference with the market for fair [fol. 275] amounts of crude oil currently being produced.

"Fourth. That in all such negotiations and in the dealings of the various state and national authorities with the oil business it be immediately and widely recognized that a fair price of crude oil is essential to its conservation, so as to prevent wastes of oil from diverting it to uses below its intrinsic value, to prevent the too rapid exhaustion of underground supplies of crude oil and of the gas energy which is necessary to bring it into the wells and to the surface, to prevent the abandonment of countless wells which otherwise would produce large quantities of crude oil that could never be recovered if those wells should be abandoned.

"Fifth. That said committee be empowered to proceed with proper negotiations with the President of the United States, the Secretary of the Interior, the Secretary of Commerce, the Federal Trade Commission, the Federal Oil Conservation Board, the Department of Justice and any or all other agencies concerned therewith to secure a recognition of the fact that it is necessary not only to conserve crude oil but to procure a fair price therefor, in order to prevent abandonment of wells, physical and economic waste and other conditions resulting from the present distress situation; in other words, that intelligent and fair control of the production of such a natural resource as oil and gas is necessary not only to the producers thereof, but to the [fol. 276] public as well, by preventing the creation and growth of monopoly, with the resultant dangers of high and unfair prices for petroleum products in the not far distant future.

"Sixth. That pending the working out of such improvements and betterments as are contemplated in this resolution, all of the oil producing states continue in force the present system of oil proration, without any abatements or lessening of restrictions, maintaining the principle of preventing waste by not allowing the production of crude oil to exceed the market demands therefor.

"Seventh. That each of the major oil producing states, Texas, Oklahoma, Kansas, California and New Mexico, immediately take steps through their Legislatures to create

oil and gas conservation commissions, or other proper authorities, to be appointed by the Governors of those states, for as long terms as possible, for the sole business of enforcing the laws of the various states as to conservation of oil and gas, adopting and enforcing rules for the reasonable carrying out of such laws by said commissions; thereby removing from undue political influence the activities of such commissions and eliminating from the oil and gas conservation programs of the various states the dangers of considerations of vote-getting.

"Eighth. That all of the oil producing states shall as rapidly as possible enact uniform laws for the conservation of these resources, similar to the laws now in force in Texas [fol. 277] and Oklahoma, which laws are generally regarded as sufficient to handle the situation, provided systems of administration are provided which will insure full, fair and fearless enforcement of the aforesaid laws, by this it is not meant that all of the oil states necessarily must be immediately subjected to proration, but they should have their legal systems provided for in case they should have flush fields brought in within their borders of major proportions.

"Ninth. That the recommendations of the Oil States Advisory Committee, as hereinabove provided for, shall so far as possible be given due consideration by the various State conservation agencies, said committee serving to contact these agencies, for the purpose of providing fair allotments of production allowables, as between the various States, with due regard for the various conditions affecting production in those States.

"Tenth. That when allocations shall have been made to the various states by said Oil States Advisory Committees, as hereinabove provided, the conservation authorities of said States, each and severally, shall proceed to allocate and distribute, as between the various fields of said States, the market available for the crude oil produced, with due regard for ratable takings as between all producers in a given field and with due regard for preventing any unfair or unreasonable discrimination between various fields.

[fol. 278] "Eleventh. That in all of such allocations, as between producers and as between fields, due regard shall

be given to the necessities of the so-called marginal or small producers—those wells which are in danger of abandonment if production or price is curtailed too far—striving in all reasonable manners to preserve and continue the life of all such small wells and fields so that they may produce the amounts of oil consistent and preventing waste therein.

"Twelfth. That proration be immediately extended by the conservation authorities of Texas to the new East Texas fields, which are now threatening to destroy the entire crude market, providing for those fields fair and reasonable markets and prices consistent with the production of the rest of the country, and that in all new areas of flush production, in whatever state, proration measure be fairly applied from the beginning of the development of said fields.

"Thirteenth. That measure be taken in all of the oil producing states to prevent the over-drilling and wasteful production of oil and gas in those areas of new production which may be developed, holding the amount of drilling to such number of wells as may reasonably seem likely to produce said oil most economically and efficiently; and also to save and preserve the gas energy of said fields; and further to encourage the idea of operators who own tracts of land, too small to support wells individually, entering into [fol. 279] partnerships creating blocks of sufficient size that they may reasonably and economically support a well or wells, thereby reducing and preventing both physical and economic wastes due to too-close drilling; that we further go on record, as favoring whenever possible and feasible the principal of unit operation as providing the fairest and most economical possible way of producing oil and, as not only affecting great savings in operation but far greater recoveries of oil and as well as rates of withdrawals that will prevent flooding the markets with new flush oil supplies that can not readily be absorbed.

"Fourteenth. That in all of the foregoing measures it be borne in mind that it is necessary not only to prorate and curtail production of oil within the United States but to prorate and curtail the imports of foreign crude oil and petroleum products with due consideration for the preservation of the American markets; and furthermore that to prevent such importations as may hereafter arise from

other countries like Russia and Roumania, effective measures should be provided by the Congress of the United States to prevent dumping of oil and oil products on the United States market.

"Fifteenth. That if the plan of agreements herein suggested for the immediate and fair curtailment of oil imports shall fail of its purpose, then we recommend that the Legislatures of the various oil states enact legislation which will have the effect of preventing importers from bringing [fol. 280] in foreign oil to the hurt and injury of United States producers.

"Sixteenth. That this committee fully recognizes that for the benefit of the consuming public fair and reasonable prices to the public must be maintained on gasoline and other petroleum products, and that to this end published recommendations be made from time to time by this committee as to what constitute fair and reasonable prices for gasoline and other petroleum products with relation to the prevailing prices for crude oil.

"Seventeenth. That this committee recommends discouragement of any increases in the gasoline taxes imposed by the various states, which taxes in all cases are paid by the consuming public as part of the price of gasoline at the filling station, and that all of the states, by proper legislation, increase the efficiency of the collection of those taxes as now imposed, so as to prevent evasions by unscrupulous concerns.

"Eighteenth. That this Committee recommends that the oil industry of the United States, through the means herein suggested and through other means which may become apparent from time to time, set unto itself the goal of so conducting its business as to control and prevent the too rapid and reckless production of oil and to assure fair prices to producers at all times for in any conservation of oil and gas the factor of price is not less important than that of curtailment; it being the feeling of this committee that if the oil industry will avoid a long period of distress and ruin to many thousands of operators, both large and small, [fol. 281] all branches of the industry must cooperate through every means available not only to assure fair prices and reasonable supplies of oil and its products, but

to prevent unreasonable and monopolistic prices in the future.

"Nineteenth. That this committee urges and requests those purchasing companies which have recently reduced prices of crude oil to restore those prices immediately to February levels, pending the working out by the various States of such measures as are recommended herein, looking to immediate betterments of prices thereafter.

"Twentieth. This committee finally recommends, in order to make permanent the foregoing program dealing with the oil industry in general, that the oil producing states here represented and which may hereafter join in this committee, enter into an inter-state compact, the terms of which shall be agreed upon by this committee at some future meeting, such inter-state compact to be only obligatory upon those states giving legislative sanction thereto, and also subject to the consent of the Congress of the United States.

(Signed) Cicero I. Murray, Chairman, Oklahoma City, Oklahoma. W. H. Cooley, Bakersfield, California. Mark D. Mitchell, Independence, Kansas. [fol. 282] Carl M. Cox, Cheyenne, Wyoming. W. Scott Heygood, Jennings, Louisiana. T. H. Barton, El Dorado, Arkansas. Robert R. Penn, Dallas, Texas."

The Witness (Governor Sterling): I know that that committee which met at Texarkana had a meeting in Washington later on. I don't think they proceeded to Washington from that meeting to see the Secretary of the Interior. At the meeting in Fort Worth there were present the gentlemen who signed that agreement and several others. Mr. Terrell of the Railroad Commission was there part of the time; he did not stay all the time; I think he was there on March 1st, on Sunday."

(The complainants then introduced in evidence letter from Mr. Penn to Governor Sterling, in which he enclosed the three copies of the resolution read to and adopted by the Oil States Advisory Committee at Texarkana on the 9th, which letter is as follows:)

"Chamber of Commerce, Texarkana, Arkansas-Texas

March 9, 1931.

"Hon. R. S. Sterling, Governor of Texas, Austin, Texas.

[fol. 283] "DEAR GOVERNOR: Enclosed herewith please find three copies of resolution adopted today by the Oil States Advisory Committee.

"I endeavored to get the committee not to give this resolution to the press, but all of the other members insisted on doing so.

"I believe you will find the resolutions to contain some constructive suggestions, and I am hopeful that it can develop into some good for the oil industry.

"I will try to call you tonight and talk to you over the 'phone about this.

"Trusting this will be satisfactory, I am,

"Yours respectfully, Robert R. Penn."

The Witness (Governor Sterling): That was a report or data assembled for the Legislative Committee. That is the resolution and report of that committee at Texarkana, that Oil States committee. I have not looked at that for some time, but I presume that report is in there. That was assembled for the benefit of the Legislative Committee. This resolution speaks for itself. I notice it says here it will be obligatory only upon those states giving legislative sanction. I think the paper handed me by counsel is the report of the meeting at Texarkana to which I have referred. However, I have not prepared it. Immediately following that is a communication addressed to the Honorable Mr. [fol. 284] Wilbur, Secretary of the Interior of the United States. I have a copy of that. Then immediately following that is report of the Committee on Petroleum Economics of the Department of the Interior. I am sure I have a copy of that. I don't know whether it came from my representative, Mr. Penn, or not, but I think I have seen this. I think I ran across the printed speech of Wirt Franklin a while ago and asked you if you wanted it. Here is one from the President, if you want that. Here is a long document prepared by the independents; you might want that. I do not have copies of the addresses of any of the other gentlemen. I don't think I received a report of the meeting of

that committee held in St. Louis on April 15, 1931. I don't remember having that report. It may be in that document there.

As to whether I received a letter from Governor Murray dated April 18th, I will say that this letter, I presume, is one received by me from Governor Murray.

(Complainants then introduced in evidence the communication addressed to the Honorable Mr. Wilbur, Secretary of the Interior, from the deposition of Mr. R. R. Penn, which is as follows:)

"Oil States

Oil States National Cooperation

Washington, D. C., April 9, 1931.

[fol. 285] "To the Honorable Ray Lyman Wilbur, Chairman of the Federal Oil Conservation Board, City.

"Honored Sir: We, the undersigned members of the Oil States Advisory Committee, duly appointed by the Governors of the respective States which we represent, to consider the present dire conditions of chaos and distress existing in the oil industry and to make recommendations for the betterment of such conditions, having requested of the Honorable Federal Oil Conservation Commission a conference as of this date, hereby submit the following:

"First: Stabilization of the production of crude oil is necessary to stability of public supply, to the elimination of waste of an irreplaceable resource, to prevention of the threatened forced abandonment of hundreds of thousands of small wells throughout the oil producing areas of the United States, to preservation of the independent oil producing area of the United States, to preservation of the independent oil operator as a competitive force, thereby avoiding the creation of monopoly, and to the prevention of loss of many millions of dollars in tax revenues to the various States and to the Nation.

"Second. No individual oil producing State, by its own laws, can adequately protect the National interest against such conditions of over-production, attendant waste and [fol. 286] resultant demoralization of a great industry, as now exist, unless the conservation efforts of the large pro-

ducing states shall be coordinated. Otherwise, curtailment efforts within one State may at any time be automatically offset and nullified by increases in importations, to the great damage of the areas of old and settled production throughout the country.

"Third. Through bitter experience, the various oil-producing States have been forced to the realization that the conservation authorities of each State must give due consideration to the general situation in the oil industry throughout the United States. With such consideration duly given, the stabilization of the production of crude oil within any State is purely a problem for solution by that State and the industry therein, with such cooperation and advice as may be rendered by interstate advisory committees and with such aids and assistance as the Federal Government may be able to give. Limitations on unnecessary drilling, conservation of gas energy, encouragement of utilization of development, ratable takings of oil among producers within a given field, and equitable apportionment of outlet as between the various fields, should be the objectives of the various state laws, and for the better saving in the ground of oil and gas not immediately needed, the State laws should be made more uniform and more effective in their enforcement.

"Fourth. Coordinated restrictions to prevent wasteful [fol. 287] over-production by the major oil producing States, with Federal co-operation, may be furthered immediately by continuing for such time as may be necessary an advisory group representing the various States and by the conservation bodies within those States adopting, as a basis of regulation of production, the regional forecasts of supply and demand such as have just been made by the Voluntary Committee on Economics of the Federal Oil Conservation Board, if and when same shall have been approved or modified by an inter-state advisory committee.

"Fifth. Equalization of the rate of foreign production, with due consideration for the proration efforts of the domestic producers, should be sought, not only to curtail imports but to safeguard the country's balance in exports, and we hereby fully indorse, and tender our thanks to your Honorable Board for the efforts put forth in procuring voluntary restrictions of imports into this country.

"Sixth. The above objectives, i. e., sound and uniform conservation laws within the various States, co-ordination of their enforcement and effect with those of other States, balancing of their joint effect against foreign production, all under a system which will be stable for sufficiently long periods to enable economic production expenditures but flexible enough to meet changing conditions, may and should be placed on a permanent basis by means of an agreement between the oil producing States, which will [fol. 288] retain for each State its own administration of its own resources but will guarantee harmonious administration and cooperation through an inter-state advisory board.

"In view of the foregoing conditions, we hereby recommend:

"I. That the Federal Oil Conservation Board continue its Voluntary Committee on Economics, to make periodic examinations into the status of the oil industry and formulate National and regional forecasts of supply and demand, and that such forecasts be given due consideration by the interstate committee and recommended, with any necessary modifications, to the respective State conservation bodies.

"II. That the Legislature of each oil producing State be requested as rapidly as possible to authorize negotiation as an interstate agreement for co-ordination of conservation measures, any such agreement being subject to ratification by the States.

"III. That pending the working out of such a compact, an advisory committee, representing the several oil producing States, continue to function as a liaison and fact finding body, to present to the conservation authorities of the various States, at such times as may be deemed necessary, recommendations for more effective cooperation as between the States.

"Respectfully submitted.

"Cicero I. Murray, Chairman, Oklahoma. Wm. H. [fol. 289] Cooley, California. Robert R. Penn, Texas. W. Scott Heygood, Louisiana. Van S. Welch, New Mexico. Alfred M. Landon, Kansas. Carl M. Cox, Wyoming. I. C. Grimm, Ohio. Warwick M. Downing, Colorado."

(Complainants then introduced in evidence the report of the Voluntary Committee on Petroleum Economics, from the deposition of Mr. R. R. Penn, which is as follows:

"National

Report of Voluntary Committee on Petroleum Economics

Department of the Interior

April 7, 1931.

"The Voluntary Committee on Petroleum Economics today made a preliminary report to Secretary Wilbur, Chairman of the Federal Oil Conservation Board, which he made public at the Department of the Interior. The Committee consisted of: E. B. Swanson, Chief Economist, United States Bureau of Mines, Chairman; John W. Frey, Bureau of Foreign and Domestic Commerce; Martin Van Couvering, Petroleum Engineer, Los Angeles; Alfred G. White, National Industrial Conference Board, New York City; and Howard Bennette, Western Petroleum Refiners Association. Its report in detail is as follows:

[fol. 290] "The Voluntary Committee on Petroleum Economics, designated by you on February 28, has, in accordance with your invitation, been engaged in the preparation of a report relating to the approximate crude oil and gasoline supply and demand for the period April 1 to September 30, 1931. This report has not yet been completed in detail, but the principal conclusions derived from the study attending the preparation of the report, are as follows:

"1. Gasoline Demand.—The American oil industry should not anticipate, during the period under consideration, a total gasoline demand in excess of 252,000,000 barrels, a decline of 0.8 per cent from the total gasoline demand of 254,108,000 barrels during the corresponding period of 1930. A relatively small increase may be expected in domestic demand, but it is probable that a decrease in shipments to other countries will more than offset it. Domestic demand during the period is estimated at 222,800,000 barrels, an increase of 1.5 per cent over the domestic demand of 219,589,000 barrels during the same period of the preceding years.

"In its determination of anticipated monthly domestic demand for motor fuel, the committee estimates that local demand during April and May will not equal that of the corresponding months of 1930; that the 1930 levels will be exceeded during June, July and August; and that domestic demand will again decline from the 1930 level during Sep- [fol. 291] tember. Estimates of gasoline shipments to foreign countries indicate an export of 29,200,000 barrels, as compared with 34,519,000 barrels during the corresponding period of 1930, shipments in each of the six months being under those of the corresponding months of 1930. The Committee includes in these estimates the quantity of unblended natural gasoline shipped from California ports to foreign countries. With regard to total demand for gasoline, or motor fuel, the committee estimates that 1930 levels will be exceeded only during July and August, the remaining four months showing varying declines from the corresponding figures of the preceding year.

"2. Imports.—Estimates based upon a careful study of all reliable data available to the committee indicate that receipts of gasoline for foreign refining centers will be reduced from the 9,863,000 barrels received during the 1930 period to approximately 6,600,000 barrels during the six month period of 1931, a decline of 3,263,000 barrels, or 33 per cent. A similar study of reliable data relative to receipts of crude oil from foreign producing countries leads to the estimate that the total of approximately 33,000,000 barrels received during the 1930 period will be reduced to approximately 30,000 barrels during the 1931 period, a reduction of 3,000,000 barrels, or 9 per cent.

"3. Gasoline Stocks.—In the absence of final data, stocks of gasoline held in storage at refineries on April 1, have [fol. 292] been calculated to be 48,000,000 barrels. The committee has estimated that an inventory objective of 30,600,000 barrels for stocks on September 30, therefore would require a net withdrawal from gasoline stocks of 17,400,000 barrels during the period under consideration.

"4. Gasoline Supply.—To meet the estimated total domestic and foreign motor fuel demand of 252,000,000 barrels, the committee anticipates the receipt of 6,600,000 barrels from foreign sources and the withdrawals of 17,- 400,000 barrels from storage, leaving 228,000,000 barrels as

the quantity which should be produced at domestic refineries and plants during the 1931 period. This corresponds with 227,260,000 barrels produced during the same period 1930. It is estimated that 3,860,000 barrels will be supplied from miscellaneous sources (the production of motor fuel at natural gasoline plants, the addition of benzol, and the unblended natural gasoline shipped from California to foreign countries). Subtracting this miscellaneous production from the total requirement, there remains the quantity of 224,140,000 barrels as the indicated amount of gasoline to be produced at domestic refineries during the period.

"5. Crude Oil Requirements.—Following a careful analysis of recent trends in gasoline recovery in each of the refining districts, the committee has reached the conclusion that the average production of gasoline, including [fol. 293] the natural gasoline blended at refineries, will equal 48.365 per cent of the crude run. Applying this ratio to the estimated refinery production of 224,140,000 barrels the committee has arrived at the figure of 463,434,000 barrels, as the estimated quantity of crude oil which will be required in the production of the estimated gasoline output.

"In addition to the requirements of crude oil for processing, it is estimated that exports will amount to 13,000,000 barrels during the period and that an additional 15,000 barrels may be represented in the consumption of crude oil directly as fuel; in crude oil transferred to fuel oil stocks and in losses in handling. The addition of these separate needs leads to the figure of 491,434,000 barrels as the total estimated crude oil requirements during the period under construction. Deducting the estimated crude imports of 30,000,000 barrels, there remains the quantity of 461,434,000 barrels as the estimated total requirement of domestic crude oil during the period.

"The estimated total requirement of domestic crude oil, 461,434,000 barrels, represents an average daily requirement, during the period, of 2,521,500 barrels. In its completed report, the Committee will direct attention to its estimate that the average daily requirement will not be reached during the first three months of the period, since it is indicated that the domestic crude oil requirements, on a monthly basis, will show the following daily average;

[fol. 294] April 2,408,000; May 2,450,000; June 2,481,200; July 2,569,800; August 2,617,000; and September 2,599,200.

"After a careful analysis of present trends in the distribution of crude oil from domestic sources, the committee has prepared the following table, showing the relative portions of the national requirements which would be contributed by the several major producing areas during the period:

Producing areas	Estimated crude oil requirements Apr. 1-Sept. 30, 1931	Daily average Apr. 1-Sept. 30, 1931	Per cent of total
Texas	162,641,000	888,749	35.25
Oklahoma	113,340,000	619,344	24.56
California	96,624,000	528,000	90.94
All Others	88,829,000	485,404	19.25
Total United States	461,424,000	2,521,497	100.00

"During the period from September 30, 1930 to February 28, 1931, the last day for which complete data are available, stocks of crude oil held in the field and by pipe line companies were reduced from 475,223,000 barrels to 461,953,000 barrels, a decline of 13,270,000 barrels, or at the daily rate of 87,881 barrels. If the same average rate of decline should continue throughout the period under consideration, field and pipe line stocks of domestic crude oil would be further [fol. 295] reduced by 16,082,000 barrels. If a similar quantity of domestic crude oil should be withdrawn from storage during the 1931 period, the crude oil requirement to be met from domestic production would amount to 445,352,000 barrels, the difference between the total domestic crude oil requirement of 461,434,000 barrels and the stock withdrawal of 16,082,000 barrels. Domestic crude oil production, amounting to 455,352,000 barrels during the period, would be at an average daily rate of 2,433,600 barrels.

"Should it be determined by the oil industry that crude oil inventories should be liquidated to a degree comparable with that indicated, it would follow that an average daily rate of 2,450,000 barrels might be established as the daily maximum at which domestic crude oil should be produced during any portion of the period now under consideration.

"Data are not available showing the quantity of crude oil held in or drawn from field storage in each of the producing states, as such statistical information is divided by major producing areas without regard to state boundaries.

The committee, consequently, is not in a position to indicate the relative extent to which field crude oil stocks should be reduced in each of the major producing states. Having estimated the relative proportions of the domestic crude oil requirements which may be allocated to each of the major producing states, the committee believes that the decision as to the quantity which should be drawn from storage and that which should be supplied through pro-
[fol. 296] duction, is one which may best be determined by the oil industry in each of the States.

"The Committee is of the opinion that many of the estimates of potential production, have been accepted as reliable, are in excess of what should be regarded as true potentials and that the formulation of more accurate estimates would be of economic benefit to the oil industry. It is suggested, therefore, that committee of competent petroleum engineers be designated by the oil industry promptly to consider the possibility of developing a method for more uniformly estimating potential crude oil production."

(The complainants then introduced in evidence the report of the April 15th meeting, from the deposition of Mr. R. R. Penn, which is as follows:)

"To Hon. William H. Murray, Governor of Oklahoma; Hon. Ross Sterling, Governor of Texas; Hon. Arthur Seligman, Governor of New Mexico; Hon. Huey P. Long, Governor of Louisiana; Hon. James Rolph, Jr., Governor of California; Hon. Harry N. Woodring, Governor of Kansas; Hon. William Adams, Governor of Colorado; Hon. Harvey Parnell, Governor of Arkansas; Hon. George White, Governor of Ohio; Hon. A. M. Clark, Governor of Wyoming.

"GENTLEMEN: We, the Representatives, appointed by you on the Oil States Advisory Committee, to consider and make recommendations for the betterment of conditions in
[fol. 297] the oil industry, in which all states represented on this committee have a vital and public interest, hereby report as follows on the question of allowable production of oil in the United States for the six months period beginning April 1, 1931:

"At our meeting held in St. Louis, Missouri, April 14th and 15th, 1931, we, your committee representatives, have carefully considered the report of the voluntary committee on Economics of the Federal Conservation Board and also the report of the Committee on Economics of the American Petroleum Institute, as to the probable supply and demand for the six months mentioned. The Federal Committee estimated a domestic demand, disregarding imports, for 2,521,000 barrels of oil per day average, including both productions and withdrawals from storage, for the six months period; and the American Petroleum Institute Committee estimated domestic demand for crude oil at 2,568,000 barrels daily average for the same period.

"Our committee is of the unanimous opinion and on motion agreed, that no sufficient reasons or inducements has been shown in the reports of either of the aforesaid mentioned reports of the committees to justify our States in making any increases in oil allowable production during the said six months period (April 1st to October 1st, 1931) and that it will be for the best interests of all our States represented, and we so recommend to our Governors and to the various conservation authorities of these respective states, that there be no increase of allowables [fol. 298] or production of crude oil within such period of time, beyond the present allowables established in these States where proration or conservation orders now in effect are beyond the present actual production of those other states now producing oil and not having proration or conservation regulations.

"It is the unanimous opinion of this committee that such program will best promote conservation of the natural resources of our States and will best prevent waste, preserve taxable values and do those other things which are for the direct benefit of our States; and that if the actual needs of the petroleum industry during this period shall exceed the actual production hereby recommended, as indicated by both reports hereinabove mentioned, then it will be to the best interest of all concerned for additional needs for crude oil to be filled out of the storage in the United States; or if the owners of such stored oil do not desire to so use said stored oil, then that sufficient inducements should be held out to the various

States interested to justify this committee in recommending increases in production to meet such demand.

"As necessary corollary to said recommendations, this committee further calls attention to the voluntary offers of the various importing companies to the Federal Oil Conservation Board, to curtail by at least twenty-five (25) per cent their importation of crude oil, gasoline and other [fol. 299] petroleum products and likewise reduce their actual production of crude oil in foreign countries, such agreements having been made upon a three months basis initially, commencing April 1, 1931, and contemplating such 25 per cent reductions as compared with the same periods in 1930; and this committee hereby recommends that the continuance of present allowables and rates of production by the various States be contingent upon this continuance, in good faith, for the entire six months period beginning April 1, 1931, for such 25 per cent (25) (or greater) reduction in importations and in foreign production.

"The following are the present daily allowable or production figures upon which these recommendations are based:

Texas	714,000 barrels
Oklahoma	550,000 barrels
Kansas	110,000 barrels
California	500,000 barrels
Arkansas	50,000 barrels
Louisiana	65,000 barrels
New Mexico	40,000 barrels
Eastern States	110,000 barrels
Rocky Mountain States	60,000 barrels
Total for United States	2,199,000 barrels

"The foregoing suggestions contemplate possible increase from 525,000 to 550,000 barrels daily in Oklahoma, if market demand for same shall be adequately shown in [fol. 300] proposals now pending before the Oklahoma Corporation Commission to increase the barrels daily.

"Attention of the Governor is respectfully called to the fact that daily production for the last week, as reported, totaled approximately 2,250,000 barrels per day in the United States, but the increase was due to the new East

Texas fields exceeding the allowable for that area, due to the fact that the proration order of the Texas Railroad Commission had not gone into effect as to East Texas. This committee recommends that said order be put into full force and effect as rapidly as possible thus bringing production within the figures recommended in this report.

"Respectfully submitted.

"Cicero I. Murray, Chairman, Oklahoma. W. H. Cooley, California. Carl M. Cox, Wyoming. W. Scott Heygood, Louisiana. I. C. Grimm, Ohio. Warwick M. Downing, Colorado. Van S. Welch, New Mexico. T. H. Barton, Arkansas. Robert R. Penn, Texas."

(The complainants then introduced in evidence letter of date April 18, 1931, from Governor Murray to Governor Sterling, which is as follows:)

[fol. 301] "State of Oklahoma, Executive Chamber, Oklahoma City

Wm. H. Murray, Governor

April 18, 1931.

"Hon. Ross Sterling, Austin, Tex.

"Dear Governor: I have received the report of the Oil States Advisory Committee as drafted in St. Louis on April 15th. It meets with my approval and I believe the public officers of Oklahoma will see that this recommendation relative to allowable production is observed in this State, provided, it is likewise observed in Texas and the other oil producing states.

"There is no doubt that the independent producers are now in a distressed condition. Among the causes of this distress are the following:

"(a) Excessive accumulations of crude oil in storage above the ground.

"(b) Potential production far in excess of demand, and

"(c) The assured continuance of this excess potential over a long period of time.

"The report of the Oil States advisory committee recommends an allowable in Texas of approximately 714,000

barrels, in Oklahoma 550,000 barrels, in California 500,000 barrels, and corresponding figures in the other states.

[fol. 302] "This report in my opinion should be approved by the Governors and made effective by the conservation agencies for the following reasons:

"(a) It recognizes the evils arising out of excessive storage, and contemplates removal of those evils.

"(b) It provides a practical method of dealing with the problem of excessive potential production and of keeping this excess in its natural ground storage until the demand justifies its withdrawal.

"(c) It recognizes the intimate relation between domestic and foreign production and prescribes a reasonable formula which will doubtless appeal to importers.

"(d) If strictly complied with, it will insure a ready market for all the allowable production and will remove the menace of distress crude.

"(e) It involves a correlation of the activities of the conservation bodies of the various states, contemplates harmonious action in oil producing areas; recognizes that control of the situation rests with the producing states and that the potential is one to be settled by them in the interest of their natural resources, their taxable revenues and their entire citizenship.

"(f) If this program is made effective by the several states, it will in my opinion create stability of production and will insure a fair price for the independent producer.

[fol. 303] "We may anticipate opposition to this program from some of the small producers who have not thought the problem through, and likewise from some of the major companies who wish to fill up their empty storage with cheap crude at the expense of the oil producing states. This opposition can only be met by the states acting in their sovereign capacities, and it is my earnest hope that the report referred to will be accepted by the several states and vigorously enforced.

"Yours truly, (Signed) Wm. H. Murray, Governor."

The Witness (Governor Sterling): A meeting of the Oil States Advisory Committee was held in Oklahoma City on September 11th. I asked Cullen Thomas to represent me.

I made that request orally, and then I sent a telegram that he would be there to Governor Murray.

On September 18th there was a meeting in my office in Austin. At that meeting there was present Mr. Hill of the Kansas Conservation Commission, I believe is the title, and also Cicero Murray, and I believe one member of the Oklahoma Commission, I think it was Paul Walker, and then there was the Railroad Commission of Texas. It seems to me that all of the members of the Railroad Commission of Texas were there. Mr. Upchurch states that he was not in the meeting. I think all three of the members of the Railroad Commission of Texas were at that meeting and held [fol. 304] a short session in my office. Cullen Thomas was there. There were no oil men present other than these commissioners; in fact, I think their sessions were closed sessions. There were no oil men present at all. At that meeting they discussed the meeting that had taken place in Oklahoma City. As to whether Mr. Hill discussed the position that he had taken at Oklahoma City, I will say that Mr. Hill did a good deal of talking. I know he was very anxious to cooperate with the other states, and I think he went so far as to say that they would still reduce their allowable production for the State of Kansas if they could arrive at some conclusion in order to conserve the oil situation.

(Governor Sterling then identified the statement of the Governors and the regulatory commissions of the Mid-Continent states, which is copied verbatim in the pleadings.)

That instrument was signed in my office and in my presence. It was signed by Mr. Thomas representing me, in my presence, and I had previously delegated him for that purpose. With reference to Mr. Terrell signing it in my presence, I will say that I think it was all signed at the table in my office. Governor Neff signed it, and also Mr. Smith signed it. I think all of the Railroad Commission signed it, or maybe it was just Mr. Terrell, but I think all of the Railroad Commission signed it.

Counsel calls attention to the fact that that document [fol. 305] simply refers to the World Oil Stabilization Program approved at Oklahoma City on September 11th.

If I signed it or permitted it to be signed, with reference to whether I must have known what that program was, I will say that it is stated there in the face of it.

Counsel calls attention to the fact that this agreement limits the production of Texas to 902,000 barrels.

As to whether that has been done since that time, I will say that I have not seen the figures lately. I think that is substantially the amount that is being produced.

On or about September 1st the Railroad Commission announced that it had arrived at a tentative order allowing 225 barrels per well in the East Texas field. Before they officially promulgated the order, I knew that they were going to enter an order allowing 225 barrels per day to be produced from each well in East Texas. When I heard of that proposition, if I remember right, I asked for a conference with the Railroad Commission, and I told them I thought it would be better to place it on an acreage basis in place of a well basis, the amount of oil to be from the whole field and not from wells, that it be handled in the way that it had previously been handled by the Railroad Commission, that is, the amount for the field or per pool, and to be adjusted in the way it had previously been adjusted, more on an acreage basis than a per well basis. The Railroad Commission did not agree to do that. As a result of that conference they placed it at 225 barrels per [fol. 306] well. They did make the order tentative so it could be changed at any time without further hearings; in other words, they put the open docket clause in the order. As to whether they did that at my instance so that they could preserve that total allowable, I will say that I think there was perhaps some member of the Commission that insisted on that too. I asked that they make it so they could change it, because there would be so many wells brought in in a little while that they would have a production that would bring in water in the field and cause physical waste. As to whether that member of the Railroad Commission to whom I refer was the Honorable Pat Neff, I will say that I am not so sure that he made a protest, but I have an idea that he did not concur in the order—that is, he did concur in the order, but I have the impression that he thought it would be better to place it another way. As a result of that conference that order was changed so as to put that open

docket in the order, the last paragraph. And as a result of that conference and that open docket order the Commission at my instance have limited that field. They have done it at their own motion, I imagine. I have conferred with the Commission, or they with me, nearly every time they issued an order since martial law was in East Texas.

Hon. Lon A. Smith, Railroad Commissioner, testified by deposition as follows:

About December 1st or 2nd, it having appeared accord-
[fol. 307] ing to the public notices that this tentative order about which we have been talking was made, Governor Sterling called various members of the Commission down to his office for a conference about that order. I don't believe my mind is sufficiently clear for me to make a succinct statement of the facts of that meeting. I remember a telephone call from Governor Sterling to come down for a conference about it. The conference was not arranged on the initiative of the Commissioners, but by the Governor. I would not say whether the Governor had in his possession a copy of this so-called tentative order at that time, or was told of its contents. In the Governor's office the question of this order which provided for the adopting of a 225 barrel allowance in the field, came up. It was the Governor's opinion that there should be some sort of a unit basis order, rather than the 225 barrel allowable.

I would have to hesitate a little bit now as to how many acres, or what the unit basis was that he recommended. He did recommend an order or proposition based on production of so much per acre or per group of acres, but I just don't remember. As to whether I recall that the Governor notified the Commissioners then that the Railroad Commission's orders would not be allowed to become effective unless it suited his views about it, I will say that he made some such statement, or a statement kindred to that. He gave us to understand that the order was not acceptable to him of 225 barrels allowable per well. I am pretty
[fol. 308] certain that he expressed himself as being favorable to 150 barrel allowable. I don't remember whether he expressed himself as to the total maximum production that ought to be allowed in the field, or not. I don't remember

whether he said it ought to be around 400,000 barrels or less. My recollection is that he took the position that 150 barrels per well would be sufficient for that field. I can't tell you what his final word in the matter was; I don't remember what his final word was.

I think the order issued effective September 5th was exactly the same as the tentative order, 225 barrels per well. The order dealt with a good many different subjects and unless I had the tentative order before me, I could not say whether there were any changes made in any of the other provisions of the order. I recall there were some changes made. My recollection is that after we went into the matter thoroughly, we decided that there should be some minor changes made in the order that we issued. I may say this: that I am persuaded, as I remember the matter, that this change did not meet with the suggestions of the Attorney General's Department. I would not say that they met with the suggestions of the Governor in the main, but they were on subjects that the Governor had suggested in the conference. In this last conference we had a little prior to the promulgation of the order, the question of the unit basis came up for consideration, which the Commission refused [fol. 309] to consider, which would mean a top allowable, I suppose, under the terms; and also the question of an oil and gas ratio to obtain in the field was discussed, and the Commission added this to the order which had been prepared the day before providing that 700 cubic feet of gas would be allowed to the production of a barrel of oil in the East Texas oil field. I do recall that Governor Sterling in those conferences took the position that there should be a top allowable around three hundred and fifty or four hundred thousand barrels. He referred to the testimony that was developed in the hearing at the Stephen F. Austin Hotel, claiming that that testimony put on by experts warranted a program of that kind, an allowable of around three hundred or three hundred and fifty thousand barrels daily production for the East Texas field.

In the conference that the commission had when it was finally agreed to pass this order to which reference is being made, I do not recall that anybody was present except our official staff and a representative of the Attorney General's Department, with the Governor. Counsel states that he had reference to these conferences called by the Governor in

which he was suggesting that the order ought to be changed. I don't remember who all was present at those conferences. If you refer to the conferences held in the Governor's office, I recall that in one or two of those conferences there was some of the representatives of the oil companies present.

[fol. 310] Referring to the conference on the first order of September 5, 1931, I recall that there were some people representing the oil companies present at those conferences. I recall that Mr. Bob Penn was present on one occasion, Mr. Ed Landreth was present on one occasion; Charlie Roeser was present; there was three or four or five; Mr. W. B. Collett of Fort Worth was present. Cicero Murray was present at conference with representatives from Kansas and Oklahoma, which was another meeting.

Counsel states that according to the press reports there was what was called a supplemental order made by the Commission undertaking to restrict the so-called twenty acre unit proviso for new drilling, that supplemental order apparently having been made some time after September 5th and prior to September 14th.

There was such an order made. The occasion for making it was the fact that intense drilling was being carried on in the field and the Commission thought that around 400,000 barrels daily would be enough for the field to produce without endangering the field and bringing about physical waste in the field, and an effort was made to keep our orders in line with the thought that this intense drilling would increase the production to such an extent that wells would be endangered—there would be danger of water encroachment. It was also a part of the idea that it was to keep the production within the 400,000 barrel maximum, believing that that would be the amount that the field could produce properly [fol. 311] without any danger to the field. And such subsequent orders as have been made have been made with the idea in part at least of holding the production within the 400,000 barrels. I would be glad to state here, though you have not asked the question, that when this new order, the second order, was being discussed, I favored that 200 barrel allowable, and the question of 175 barrels seemed to be in the minds of others, and I claim that I am responsible for its being 185, because I would not sign an order that made

the amount lower than 185 barrels per well; I wanted 200, a reduction of twenty-five barrels to the well. The Governor wanted 175 barrels. Well, the Governor agreed to a program like that at that time, and the Chairman of the Commission as to that matter felt that 175 barrels would be proper.

Counsel states that it appears that a conference was held in Oklahoma some time the first part of September of this year in which various parties participated, including Thurman Hill, purportedly representing the Public Service Commission of Kansas; Paul A. Walker, Chairman of the Corporation Commission of Oklahoma; Cullen F. Thomas, representing Governor Ross Sterling; W. S. Farish, President of the Humble Oil & Refining Company, Thomas F. Lydon, vice-president of the Shell Petroleum Corporation, and divers other persons, at which a general decision was reached, according to the reports, that 2,376,000 barrels per day was the proper figure for total production in the [fol. 312] United States, and as a result of the meeting certain general recommendations were made in line with the proposition, allocating to the various oil producing states, a stated maximum, a rather full report of that conference being contained on pages 13 and 100 of the Oil and Gas Journal of the issue of September 17, 1931.

I read the report of that meeting, not in that publication, but in the press generally. I don't think I ever read the report as given in this particular journal.

Counsel refers to the fact that one of the things stated in the report of that conference was that Governor Sterling had approved the findings of that conference in Oklahoma, and that a committee would arrange for a conference with the Railroad Commission of Texas and others, and counsel also states that other public notices purport to show that a conference was held with the Railroad Commission of Texas and other people in Austin on September 18th, which may have covered more than one day.

I recall that latter conference. The conference was held in the Governor's office. It began on one day and was concluded the next morning. However, there was not a conference on the second day morning, but a report was prepared and issued. The Governor of Texas arranged for

that conference, so far as the Railroad Commission of Texas is concerned, and it was held in his office, and the three commissioners and the Oil and Gas Supervisor were present for the conference in which there were representatives from Kansas and Oklahoma, official representatives [fol. 313] of those states. Mr. Cullen F. Thomas was present representing Governor Sterling as he announced in the conference. Governor Sterling was also personally present. I don't recall whether there were any other state officials or representatives of state officials present or not. There were about a dozen people, perhaps, in the room, but most of them were out of state people. Hill from Kansas was present, and Walker from Oklahoma was present. There was a written report or recommendation delivered to the conference. I do not have a copy of that report and do not know who has one. The general provision of that report was that the three oil-producing states in the Mid-Continent territory should agree on a certain amount of production for the three states. I don't remember just what that was for the three states, referring to Texas, Oklahoma and Kansas. I remember further that the Railroad Commission of Texas objected to some of the provisions of this report that was brought to us from these representatives, and we failed to agree in the first day's session, and our Commission suggested that our Chairman represent it in the matter, even voting in this conference that he should go to Washington in response to a call by the President of the United States.

The Texas Commission objected to the idea of placing any restriction on the oil fields of Texas in an effort to hold down production which would appear to be for the purpose of raising prices, and our instruction to our representatives was, to which he agreed, that we would not do anything in taking part in this contact with these other [fol. 314] states, that we could not do as a legal act of the Commission. It was our idea that the proposition as submitted included the proposition of affecting the prices; that was the main object of the report; that was urged in the conference. As to whether I recall any especially who urged that as a reason for its adoption, I will say, to be frank with you, the question of price making was kind of held in the background, as it has been held in the background all along in these conferences and meetings. But

it was finally understood that in part at least it was a price-affecting measure.

Governor Sterling favored the original proposition originaly submitted by the representatives of those two states, Kansas and Oklahoma. I would not say that Governor Sterling espoused it on the ground of affecting the price. Mr. Thomas favored the proposition as the Governor's representative. Counsel states that he notices in these published reports of other conferences that Mr. Hill frankly stated it as a price-fixing measure in part. I recall that he made remarks on that subject in this conference. Mr. Hill made a speech, Mr. Walker made a speech, there were various speeches made, and I am certain they referred to the measure as being, in part at least, a price-fixing measure. Mr. Hill at least did refer to it as being in part a price-fixing measure. He suggested that the oil business would go on the rocks if a program like this was not adopted. As to whether, in that connection, the committee [fol. 315] had determined that it would take a price of one dollar and ten cents a barrel to give any profit on the production of oil—in other words, that the committee had arrived at that figure as being the cost of production, I will say that I am certain that some price of that kind was suggested, and that unless some such measure as this were adopted, and unless the oil companies would pay what they called a fair price, taking into consideration a dollar and ten cents or that approximate figure, that the oil industry, as they stated, would go on the rocks.

The production was curtailed by this order to a hundred and eighty-five barrels in order, in part at least, to keep within the general figure of four hundred thousand barrels for the protection of the industry. There wasn't any hearing held on that order. The Commission has a rule that provides that, on its own initiative, if it is thought the situation demands, we may change the allowable without a public hearing, and this order was made under that general rule of procedure. I do not recall who originated the idea of making this new order. I know I did not because I was favorable to keeping it just as high as I could. I never would have changed from two hundred and twenty-five barrels if it had not been just for the thought of taking care of the field.

My position in respect to the restriction of production has been all the while that unless it could be proven that there was physical waste, the field should produce all that [fol. 316] it could produce as long as there was no evidence of physical waste in the production. My position has been that the man who owned the land, or the leaseholder of the land, so long as he did not commit physical waste, had the right to produce all that the land was capable of producing. In that position I understand that I am in line with the rule of property as announced by the Supreme Court. In that connection I may suggest that the question of physical waste covers perhaps a good deal more than having some of the oil evaporate on top of the ground, and having the ground to absorb it. "Waste," as a word at least, could be applied to almost anything you can think of. Counsel suggests that in most cases it would be a question of what is or is not waste and would come down to a question of judgment on which men of the same skill and ability and experience might easily differ. In these hearings we had from time to time we had men who were testifying under oath that they were experts, and there were so many and such a multitude of angles that came up for consideration that I am prepared to confess frankly that it might be hard to determine when physical waste is present.

Counsel suggests that no expert within my knowledge has so far appeared who could explain or did explain even on their own theories, that there could be any loss to mankind by the shifting of oil from place to place by the encroachment of water.

It is true that it does not eat up the oil; it moves it to some other place. If a large quantity of oil were moved out of the East Texas field by water, there is no proof and [fol. 317] no theory advanced yet to explain how that could be lost to mankind, even if shifted; it would be lost to the individual owner of an acre of land here. If that oil were pushed under some other acre, some other man would get it, and it would not be physical waste.

Counsel suggests that it would be for the uses of mankind when they got down to it.

In such orders as have been made since September 18th, the Commission has observed, so far as it could, its agreement made on September 18th for the production of 400,000 barrels in the East Texas field. We have the maxi-

mum of 902,000 barrels for the State, but we have had occasion only to deal with the East Texas field. As to whether, so far as I know, that agreement is going to be observed, at least for some time in the future, I will say that right now the Railroad Commission seems to have no idea that it can execute in regard to that, since military rule prevails. Since martial law prevails, we are not considered, and it is not discussed with us as to these orders now. The Railroad Commission still has its force in the East Texas field under its jurisdiction. They have absolutely not in any wise been yielded to the command of the military authorities. Our organization is as independent as it has been so far as the idea of conservation is concerned. The Governor with his military representatives has taken over the proration end of it, but the conservation end of it is still with the Railroad Commission; our office force is there and our field men are there and they are looking after [fol. 318] such matters as pertain to matters other than the actual production of the wells; they are keeping us informed, sending us reports daily so we may keep our records intact. The last order that counsel has referred to as having been made by the Commission was made effective as of October 13, 1931. That was an order reducing the production per well to 165 barrels per day. There was no hearing and no notice on that order.

Counsel suggests that it appears that the order in substance and reality, in words, was embodied in a so-called executive order by the Governor. The Railroad Commission issued its order and then the executive adopted the order as issued by the Railroad Commission.

If there was any conference between the Commission and the Governor in respect to either the making of that order or the Governor's adoption of it, I am certain I did not participate in the conference.

Counsel states that the press reports today, at the time my deposition is being taken, carry the news that effective Saturday, the Governor proposes to inaugurate a further reduction to a hundred and fifty barrels per day.

The Railroad Commission has absolutely not been consulted by the Governor in respect to that matter. The Governor called Mr. Parker and myself into his office yesterday for a conference on the general management of the

field over there, as to our men and his men, and General Wolters was present, and I heard him make the statement to General Wolters, "Issue the order tomorrow morning [fol. 319] for 150 barrels allowable for the East Texas field." Governor Sterling did not make any statement yesterday other than what I have just stated as being the statement made to General Wolters, that I now recall, touching the question of proration in the East Texas Oil Field.

Going back to this order of September 5, 1931, counsel suggests that Commissioner Neff at the time the tentative order that has been referred to was drawn, was refusing to concur in or sign it.

I don't know whether he refused to sign that order or not. It was not signed until we had the conference referred to already, and he suggested that he wanted to put in this idea of 700 cubic feet of gas being allowed for the production of a barrel of oil, and that was put in. I would not say that he said he would not sign the order.

In the making of all these orders that we have referred to, the Commissioners really felt that there was not any reliable evidence on which to base a finding of oil and gas ratio, and they still think that.

(End of the witness.)

(The Complainants then introduced in evidence copy of order of the Railroad Commission of date September 2, 1931, which is as follows:)

"Oil and Gas Docket No. 120

In re Conservation and Prevention of — Crude Petroleum Oil and Natural Gas in the East Texas Field

[fol. 320] Austin, Texas, September 2, 1931.

Special Order Fixing Rules and Regulations for the Prevention of Physical Waste of Crude Petroleum Oil and Natural Gas in What is Known as the East Texas Field, Composed of Upshur, Smith, Rusk, and Gregg Counties, Texas

Whereas, the recently adjourned Special Session of the Forty-second Legislature enacted a comprehensive amend-

ment to the oil and gas conservation laws of the State of Texas, redefining "waste" of crude petroleum oil and natural gas and prescribing the powers of the Railroad Commission of Texas in preventing waste thereof; and

Whereas, immediately upon the adjournment of said First Called Session of the Forty-second Legislature this Railroad Commission promulgated an order directing that a special hearing should be held in the City of Austin, Texas, on the 25th day of August, 1931, to determine what field rules and regulations, if any, should be prescribed, to carry out the policies underlying the new legislation, in the so-called East Texas field consisting of Upshur, Smith, Rusk and Gregg Counties, Texas. Pursuant to statutory notice, this hearing was held and evidence was offered tending to show that waste of crude petroleum oil and natural gas is now taking place or was taking place in said East [fol. 321] Texas field as defined herein prior to and at the time of the shut-down of said field on or about the 17th day of August, 1931, and that waste of said oil and gas is threatened in said East Texas field in the respects hereinafter mentioned and that the rules and regulations hereinafter prescribed will prevent or tend to lessen the waste of said oil and gas in said field.

In the recently enacted legislation the Legislature of Texas has provided that waste shall not be construed to mean "economic waste"; and further that the Railroad Commission of Texas "shall not have power to attempt by order or otherwise directly or indirectly to limit the production of oil to equal the existing market demand for oil." In view of this legislative mandate the Railroad Commission has deemed it improper to consider any evidence at the hearing which convened on August 25, 1931, and was concluded on August 28, 1931, dealing with economic conditions in the oil industry. Accordingly, at the hearing mentioned no evidence was heard or considered dealing with price or with the limitation of production with a view of stabilizing or raising the price of crude petroleum oil.

On consideration of all of the evidence adduced at said hearing the Railroad Commission of Texas is of the Opinion and so Finds and Orders that the following rules and regulations are reasonable and necessary and will pre-

vent, or greatly minimize, the waste of crude petroleum oil [fol. 322] and natural gas in the East Texas field.

1

That present producing areas and extensions thereof in the counties of Gregg, Upshur, Smith and Rusk, Texas, shall constitute and be known as the "East Texas field."

2

It appearing from the evidence that the spacing of wells in said East Texas field, under the terms and prosivions of the Railroad Commission's oil and gas conservation Rule 37 threatens to cause actual physical waste due to the too rapid dissipation of gas energy in the production of oil and also due to the too rapid encroachment of water, that in the interest of preventing actual physical waste of oil and gas in said East Texas field, it is desirable to modify said Rule 37 as applied to said field. Therefore, it is here now ordered by the Railroad Commission that said Rule 37, in so far as it applies to the East Texas field, be modified and the following rule is provided: "No well for oil or gas shall hereafter be drilled nearer than 660 feet to any other completed or drilling well on the same or adjoining tracts of land and no well shall be drilled nearer than 330 feet to any property line; provided, that the Commission, in order to prevent waste and to protect vested rights, shall and will grant exceptions permitting drilling within shorter distances as above described upon application filed fully stating the facts, statutory notice thereof having first [fol. 323] been given to all adjacent lessees or operators thereof; and provided further that this modification of Rule 37 shall not be applied against wells already begun or offsets thereto." It is not the intention of the Railroad Commission to repeal Rule 37 by this order, but only to provide a special rule applicable only in said East Texas field.

3

All wells hereafter completed in said East Texas field shall be equipped with and produced through tubing of not more than two and one-half (2½) inches in diameter, and be bottomed not higher than the top of the producing oil sand. All wells heretofore completed and not tubed shall

be tubed in accordance with the provisions of this order immediately after this order become- effective. All flowing wells in said East Texas field shall also be equipped with adequate choke devices.

4

Evidence having been offered showing that there is a water table underlying the western side of said East Texas field and that some wells are now producing salt water, and that there is a threatened further intrusion of said salt water, therefore, it is here now ordered by the Commission that within five (5) days after this order becomes effective the owners of every well in said East Texas field now producing salt water shall plug same back by filling said hole [fol. 324] with cement to such a point that the bottom of the hole will be at least ten (10) feet above the water table, if the thickness of the sand will permit, and if any well hereafter shall produce salt water the owner thereof shall immediately plug same off in like manner. All plugging work required hereunder shall be subject to the supervision and approval of the deputy oil and gas supervisor in charge. It shall further be the duty of said deputy oil and gas supervisor in said field to make constant investigations to determine what wells are producing salt water and to see that the owners of all wells producing salt water comply with the requirements hereof.

5

It appearing from the evidence that actual physical waste has probably resulted in said East Texas field by the drilling of wells to a depth below the water table, or too near the water table: It is, therefore, ordered that hereafter no well shall be drilled into the producing oil sand more than two-thirds (2/3rds) of the distance from the top of the sand to the known water level. Immediately upon the completion of any well hereafter completed the owner or operator thereof shall advise the deputy oil and gas supervisor in whose territory the well is located, the exact depth of such well and the depth into which said oil sand was penetrated, and no person shall be permitted to operate any well not completed in conformity herewith.

[fol. 325] 6

The Legislature of Texas in the recently enacted conservation statute has provided that the operation of any oil well with the gas-oil ratio exceeding that fixed by the Railroad Commission shall be regarded as waste. The Railroad Commission is in full accord with the policy thus announced. On several occasions it has requested the enactment of such legislation and now desires to do everything in its power to carry out the Legislative will. The evidence offered at the hearing, however, in so far as it dealt with the oil-gas ratios in the East Texas field was very meager and unsatisfactory. It appears that the operators in said field have not made accurate and reliable tests to determine the gas-oil ratios of their wells and have not kept adequate and accurate records. The Railroad Commission feels that further investigation must be made under its supervision before it can prescribe any comprehensive and adequate regulation dealing with gas-oil ratios in said field. Accordingly, it is here ordered that it shall be the duty of the Railroad Commission's agents and employees in the East Texas field to immediately begin the collection of data relating to gas-oil ratios and it shall be the duty of the owner or operator of each well in said field to furnish all information and data that may be requested by any agent or representative of said Railroad Commission, and further, shall equip his well or wells with necessary equip-
[fol. 326] ment for metering gas and taking pressures, as if, and when required by the Railroad Commission.

The Railroad Commission, while believing, as above indicated, that the evidence offered at said hearing is not sufficient for an order fixing an oil-gas ratio for the oil wells in said fields, yet feels that there was evidence suggesting that the Commission should do something to prevent, as far as possible, the wasteful utilization of gas energy in the production of oil, while the Commission is conducting its investigation as provided for herein. Evidence was offered before the Commission tending to show that the best results up to date in the use of gas energy have been obtained when the oil wells in said East Texas field were producing at the rate of between 200 and 300 barrels of oil per day.

It is, therefore, ordered by the Railroad Commission that the production of oil from each and every well in said East

Texas field shall be limited to 225 barrels in any one day for the period of time covered by this order or until the Railroad Commission has completed its investigation work in said field and has promulgated such further orders as may be deemed necessary to secure a proper and efficient use of the gas energy in the production of oil in said field. Provided further that no operator shall be permitted to arbitrarily close his wells or any well down for for one day or [fol. 327] more than later undertake to produce said well or wells at the rate above 225 barrels sufficient to make up for the oil not produced when said well or wells were arbitrarily shut down, but in case a well or wells are unavoidably shut down for a period of one day or more, then the Commission may, in its discretion, grant a special concession to permit such producer to make up his daily average in production. Provided, however, that no well shall be permitted to produce with a gas-oil ratio in excess of 700 cubic feet of gas per barrel of oil.

7

No air or gas lift artificially applied shall be used in the East Texas oil field.

8

No well shall be permitted to clean itself and begin the flow of oil into or upon the derrick or derrick floor and in cleaning itself it shall be through a choke and an outlet shall be provided with a terminus into a pit at least 40 feet from the edge of the derrick floor or from any building, tank, or other structure which might constitute a fire hazard.

9

Each well shall be equipped with a blow-out preventor before drilling into the oil producing sand.

10

No boiler or electric generator shall be placed nearer then 150 feet to any producing well and before any well [fol. 328] is brought into production boilers shall be moved back to conform to this rule.

11

All wells shall be completed in the daylight hours before sunset.

12

No well shall be brought into production until a duly authorized agent of the Commission shall issue a permit to the effect that such well has been properly completed and equipped in accordance with the rules and regulations of the Commission. However, such permit shall not be required or shall be waived if, after 72 hours after written notice to said agent, inspection is not made.

13

All conservation rules of the Railroad Commission heretofore promulgated from time to time, applicable in the East Texas field, shall still be enforceable unless in conflict herewith. This does not include former proration orders in said field.

14

The terms "Commission" and "Railroad Commission" as used in this order shall mean the Railroad Commission of Texas. And, further, the terms "Supervisor", "Deputy Supervisor", "Agents", "Employees", etc., as used in this order shall mean employees of the Railroad Commission of [fol. 329] Texas only.

15

Nothing contained in this order shall be construed to relieve any party, any common pipeline carrier, or any common purchaser from the duties and obligations imposed by Chapter 36, page 17 of the Acts of the Forty-first Legislature at its Fifth Called Session, commonly known as the "common purchasers act," and all amendments thereto including an act passed by the First Called Session of the Forty-second Legislature, commonly referred to as House Bill 19, nor to modify or change any provisions of said Acts.

16

This order shall become effective at 7 a. m. September 5, 1931, and shall remain in full force and effect until 7 a. m.

October 31, 1931, unless repealed, changed or modified by the Railroad Commission of Texas at an earlier date. It is distinctly understood that this cause is held open on the docket during said period and the Railroad Commission shall have the right and power to set aside, change or modify said order in any respect, based upon evidence which was adduced at the hearing in Austin on August 25, 1931 to August 28, 1931, inclusive, without further notice.

C. V. Terrell, Chairman Railroad Commission of [fol. 330] Texas. Lon A. Smith, Member Railroad Commission of Texas. Pat M. Neff, Member Railroad Commission of Texas.

Attest:

C. F. Petit, Secretary Railroad Commission of Texas. (Seal.)

(The complainants then introduced in evidence order of the Railroad Commission of date September 18, 1931, which is as follows:)

Railroad Commission of Texas, Oil and Gas Division

Oil and Gas Docket No. 120

In re Conservation and Prevention of Waste of Crude Petroleum Oil and Natural Gas in the East Texas Field

Austin, Texas, September 18, 1931.

Supplemental Order Further Amending Special Order Fixing Rules and Regulations for the Prevention of Physical Waste of Crude Petroleum Oil and Natural Gas in the East Texas Field in Upshur, Smith, Rusk, and Gregg Counties, Texas

Whereas, the Railroad Commission of Texas on September 2, 1931, adopted an order promulgating rules and regu- [fol. 331] lations for the prevention of physical waste of crude petroleum oil and natural gas in what is known as the East Texas field, composed of Upshur, Smith, Rusk and Gregg Counties, Texas, and among other provisions of said order, adopted for that purpose was a limitation of production of each well in said field to 225 barrels of oil daily; and

Whereas, conditions are such that in order to safeguard against waste in said field it is necessary, under existing conditions, to further limit the production of said field, and while the Commission is still of the opinion that the evidence was not sufficient to form the basis of an order definitely utilizing to the fullest extent the gas energy and hydrostatic pressures in the pool or reservoir, it is of the opinion and so finds that withdrawals of oil from said pool should be held within safe bounds by temporary methods until by proper and complete investigation the accurate and correct method of pressure control or correct gas/oil ratios may be established for the operation of said pool so as to hold the waste of oil and gas therein to a minimum. In furtherance of this finding, at the present time, the daily production per well in said field should not exceed 185 barrels of oil per day, and the gas/oil ratio should not exceed 500 cubic feet per barrel of oil.

Therefore, it is ordered by the Railroad Commission of Texas that its order of September 2, 1931, be further [fol. 332] amended so as to provide that after 7 o'clock A. M. September 21, 1931, the production of oil from each and every well in said East Texas field shall be limited to 185 barrels in any one day for the period of time covered by said order of September 2, 1931, or until the Railroad Commission shall have completed its investigation in said field or until the order may be amended or changed for good cause shown; and for the same period it is ordered that the gas/oil ratio of each and every well in said field shall not exceed 500 cubic feet of gas per barrel of oil.

It is further ordered that this case be and the same is hereby continued on the Commission's Docket upon the same terms and conditions as set out in Paragraph 16 of said order of September 2, 1931, and that the terms of said order, and amendments thereto, not in conflict herewith be continued in full force and effect.

Railroad Commission of Texas, by C. V. Terrell. Chairman; Lon A. Smith, Commissioner; Pat M. Neff, Commissioner.

Attest: C. F. Petet, Secretary. (Seal.)

[fol. 333] (The complainants then introduced in evidence order of the Railroad Commission of date October 10, 1931, which is as follows:)

Railroad Commission of Texas, Oil and Gas Division

Oil and Gas Docket No. 120

In re Conservation and Prevention of Waste of Crude Petroleum Oil and Natural Gas in the East Texas Field

Austin, Texas, October 10, 1931.

Supplemental Order Further Amending Special Order Fixing Rules and Regulations for the Prevention of Physical Waste of Crude Petroleum Oil and Natural Gas in the East Texas Field

Whereas, the Railroad Commission of Texas on September 2, 1931, adopted an order promulgating rules and regulations for the prevention of physical waste of crude petroleum oil and natural gas in what is known as the East Texas field, composed of Upshur, Smith, Rusk and Gregg Counties, Texas, and among other provisions of said order, adopted for that purpose was a limitation of production of each well in said field to 225 barrels of oil daily, and later by order of September 18, 1931, the allowable production per well was further reduced to 185 barrels; and

Whereas, it appears that the further reduction in pro- [fol. 334] duction has benefited the field, and tended to minimize waste; and

Whereas, conditions are such that in order to safeguard against waste and make further improvement in said field it is necessary, under existing conditions, to further limit the production of said field, the Commission is of the opinion and so finds that withdrawals of oil from said pool should be held within safe bounds by temporary methods until by proper and complete investigation the accurate and correct method of pressure control or correct gas/oil ratios may be established for the operation of said pool so as to hold the waste of oil and gas therein to a minimum. In furtherance of this finding the daily production per well in said field should not exceed 165 barrels of oil per day.

Therefore it is ordered by the Railroad Commission of Texas that its order of September 2, 1931, be again amended so as to provide that after 7 o'clock A. M., October 13, 1931, the production of oil from each and every well in said East Texas field shall be limited to 165 barrels

in any one day for the period of time covered by said order of September 2, 1931, or until the Railroad Commission shall have completed its investigation in said field or until the order may be amended or changed for good cause shown; and for the same period it is ordered that the gas/oil ratio of each and every well in said field shall not [fol. 335] exceed 500 cubic feet of gas per barrel of oil.

It is further ordered that this case be and the same is hereby continued on the commission's docket upon the same terms and conditions as set out in Paragraph 16 of said order, and amendments thereto, not in conflict herewith be continued in full force and effect.

Railroad Commission of Texas, by C. V. Terrell, Chairman; Lon A. Smith, Commissioner; Pat M. Neff, Commissioner.

Attest: C. F. Petet, Secretary. (Seal.)

(The complainants then introduced in evidence copy of General Order No. 12, of date September 19, 1931, issued by the command of Brigadier-General Wolters, which is as follows:)

Headquarters Military District of Upshur, Rusk, Gregg, and Smith Counties

General Order No. 12

Camp Parrish,
Kilgore, Texas, 19 September, 1931.

1. Attention is directed to Supplemental Order of the [fol. 336] Railroad Commission of Texas, Oil and Gas Division, in Oil and Gas Docket 120 dated 18 September 1931 in Re Conservation and prevention of waste of crude petroleum oil and natural gas in the East Texas field; copy of which is hereto attached marked "Annex A-2", and is part of this General Order #12 just as if embodied in the body thereof.

2. The provisions contained in Annex A-2 will be complied with.

3. General Order #10, September 4, 1931, and the provisions of "Annex A" thereto attached will continue in

force and effect except that the allowable production of crude petroleum oil per day and the gas ratio per barrel is superceeded by the provisions contained in "Annex A-2" attached to and made a part of this General Order.

4. The Provost Marshal will enforce this General Order.

By command of Brigadier General Wolters.
Frank L. Chapa, Captain 124th Cavalry, Adjutant.

Official:
Frank L. Chapa, Captain 124th Cavalry, Adjutant.
(Seal.)

(To which is attached supplemental order of the Railroad Commission of date September 18th, which has just been introduced.)
[fol. 337] (The complainants then introduced in evidence memorandum issued by command of Brigadier-General Wolters, of date of October 2, 1931, addressed to all operators in the military district of Upshur, Rusk, Gregg and Smith Counties, the subject being "Plugged well data," which is as follows:)

Headquarters Military District of Upshur, Rusk, Gregg, and Smith Counties

Memorandum

Kilgore, Texas, October 2, 1931.

To all operators in the military district of Upshur, Rusk, Gregg, and Smith Counties:

Subject: Plugged well data

1. Railroad Commission records covering wells heretofore plugged against water are incomplete. In order that the Commission and operators interested in the field may obtain all available data, this memorandum is issued.

2. All operators who plugged back a well or wells in this field since the commencement of production will make complete report on the well or wells affected, giving the following data:

A. Initial total depth of well.

B. Production before plugging back.

[fol. 338] C. Plugging back depth.

D. Production after plugging back.

E. Method used in plugging back.

3. All operators who have wells plugged back in the future will furnish the above data.

4. All reports as to the wells heretofore plugged back will be forwarded to these headquarters on or before October tenth, 1931 and those hereafter plugged back immediately upon completion of the job.

By command of Brigadier General Wolters.
Fred W. Edmiston, Captain Cavalry, T. N. G., Adjutant.

Official:
Fred W. Edmiston, Captain Cavalry, T. N. G., Adjutant. (Seal.)

(Complainants then introduced in evidence order of Governor Sterling, dated October 29, 1931, which is as follows:)

Executive Office, Austin, Texas

October 29, 1931.

To Brigadier General Jacob F. Wolters, in command military forces, East Texas oil fields, Kilgore, Texas:

[fol. 339] Sir: Whereas, I have received advice and information believed by me to be reliable and true, to the effect that the present production of oil in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, is such as to now endanger the oil field and to destroy or seriously impair the present oil wells; and,

Whereas, I have received advice and information, believed by me to be reliable and true, to the effect that there is much dissatisfaction among land owners and small operators because of the foregoing conditions, and that if such conditions are permitted to continue the result will be acts of violence, breach of peace, disorder, possible destruction of property, and serious interference with the suppression

of insurrection, to suppress which Martial Law was declared in said counties, effective August 17, 1931, and which is now and has at all times since said date been in full force and effect; and

Whereas, I believe that it is necessary, as a precaution against acts of insurrection, riot, breach of peace, tumult and general disorder, of which there is imminent danger in the aforesaid counties, and that it is a proper measure and the only means at my command to suppress the existing insurrection in said counties and prevent further acts of insurrection, riot, tumult, breach of peace and general disorder in said counties, and to remove the existing imminent danger of such unlawful acts in said counties, for me to [fol. 340] cause oil production from each oil well in said counties to be limited and restricted for the present to 150 barrels of oil per day;

Now, therefore, you are hereby commanded and directed to issue and promulgate, as the order of the Governor of Texas and commander-in-chief of the military forces of this State, your order allowing not to exceed 150 barrels of crude petroleum to be produced per day from any well in the Military District, as defined in said Original Proclamation, No. 8447, and to put the same into full effect as the Military orders of your command effective at 7 a. m., October 29, 1931.

The original Proclamation No. 8447, dated August 16, 1931, is hereby continued in full force and effect, subject to this order.

(Signed) R. S. Sterling, Governor of Texas.

By the Governor.

(Signed) W. W. Sterling, The Adjutant General.

(The complainants then introduced in evidence order of Governor Sterling of date November 6, 1931, which is as follows:)

Executive Office, Austin, Texas

November 6, 1931.

To Brigadier General Jacob F. Wolters, in command [fol. 341] military forces, East Texas oil fields, Kilgore, Texas.

Sir: Whereas, for the reasons given in Executive Order addressed to you of date October 29, 1931, it is necessary

to further restrict and limit the production of oil in the Military District, composed of the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas;

Now, therefore, you are hereby commanded and directed to issue and promulgate as the order of the Governor of Texas and Commander-in-Chief of the Military Forces of this State an order allowing not to exceed 125 barrels of crude petroleum to be produced per day from any well in the Military District, as defined in the Original Proclamation, No. 8447, declaring Martial Law in the Counties of Gregg, Upshur, Rusk and Smith, and to put same into full effect as the military orders of your command effective at 7 a. m., November 7, 1931.

The original proclamation, No. 8447, dated August 16, 1931, is hereby continued in full force and effect, subject to this order.

(Signed) R. S. Sterling, Governor of Texas.

By the Governor.

(Signed) W. W. Sterling, Adjutant General.

[fol. 342] (The complainants then introduced in evidence order of Governor Sterling of date December 10, 1931, which is as follows:)

Executive Office, Austin, Texas

December 10, 1931.

To Brigadier General Jacob F. Wolters, in command military forces, East Texas oil fields, Kilgore, Texas.

Sir: Whereas, for the reasons given in Executive Order addressed to you of date October 29, 1931, it is necessary to further restrict and limit the production of oil in the Military District, composed of the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas;

Now, therefore, you are hereby commanded and directed to issue and promulgate as the order of the Governor of Texas and Commander-in-Chief of the Military Forces of this State an order allowing not to exceed one hundred (100) barrels of crude petroleum to be produced per day from any wells in the Military District, as defined in the Original Proclamation No. 8447, declaring Martial Law in

the Counties of Gregg, Upshur, Rusk and Smith, and put [fol. 343] same into full effect as the Military Orders of your command effective at seven A. M., December 11, 1931.

The Original Proclamation, No. 8447, dated August 16, 1931, is hereby continued in full force and effect, subject to this order.

(Signed) R. S. Sterling, Governor of Texas.

By the Governor.

(Signed) W. W. Sterling, Adjutant General.

(The complainants then introduced in evidence the full text of the World Oil Stabilization program promulgated at the meeting in Oklahoma City on September 11th, as found in the Oil & Gas Journal of September 17, 1931, beginning on page 13 of said issue, which is as follows:)

Recommend 2,376,000 Barrels per Day

Public Service Commissioners of Kansas, Oklahoma, and Texas and Oil States Advisory Committee Agree on Allowables

It was decided that 2,376,000 bbls. per day was a sufficiency of crude oil production in the United States after an all-day session of representatives of the public service commissions of the States of Kansas, Oklahoma and Texas held in Oklahoma City on Saturday, September 12.

[fol. 344] The figure was arrived at by public service commission members and representative oil men acting as a committee consisting of Thurman Hill, Public Service Commission of Kansas; Paul A. Walker, Chairman of the Corporation Commission, representing Governor Ross Sterling; Cicero Murray, chairman of the Oil States Advisory Committee; A. W. Peake, vice president of the Standard Oil Co. of Indiana; W. S. Farish, president of the Humble Oil & Refining Co.; R. M. Young, president of the Carter Oil Co.; Thomas F. Lydon, vice president of the Shell Petroleum Corp.; Rush Greenslade, vice president of the Gypsy Oil Co.; E. B. Reeser, president of the Barnsdall Oil Corp., and president of the American Petroleum Institute; Wirt Franklin, president of the Wirt Franklin Petroleum Corp. and president of the Independent Oil Men of

America; W. H. Cooley of California; Van S. Welch of New Mexico; Warwick M. Downing of Colorado, and Earl M. Cox of Wyoming, the last four named being members of the Oil States Advisory Committee, and William N. Davis, vice president of the Phillips Petroleum Co. and president of the Mid-Continent Oil & Gas Association.

It was decided that if the figures were acceptable to Governor Sterling and the Texas Railroad Commission that they would be put into effect on October 1 and continue in effect until December 31, inclusive. It was later reported by Cullen F. Thomas, representing the Texas governor, that Governor Sterling had approved the findings of the [fol. 345] committee and the commissioners of the several states.

The production of 2,376,000 bbls. a day is allocated to the states as follows:

Production by States

Texas	900,000
Oklahoma	546,000
California	500,000
Kansas	110,000
Eastern states	108,000
New Mexico	50,000
Other Rocky Mountain States	52,000
Arkansas and Louisiana	110,000
Total	2,376,000

The meeting was called by Thurman Hill of the Kansas Public Service Commission for the purpose of arranging an equitable program of conservation of petroleum in the States of Kansas, Oklahoma and Texas. At the same time Cicero I. Murray, chairman of the Oil States Advisory Committee, called the members of his committee together to consider the question of world production and to assist in an advisory way in the proceedings of the meeting called by Commissioner Hill.

In opening the session, which was well attended by leading Mid-Continent oil executives and individual oil men, Commissioner Hill stated the object of the meeting in a [fol. 346] short prepared address.

Potentials

"It is suggested each state represented here reserve to itself the right to determine upon methods to be used in ascertaining the true potential output of each oil well within the limits of the several states," said Commissioner Hill.

"Much criticism in the past has been directed at the methods used to determine the actual production of wells and this criticism can be removed by each state insisting upon fair guages being made.

"It would be wise for the several commissions to interchange ideas as to potential methods so eventually the guaging of wells would be uniform throughout the Mid-Continent area.

"We make this suggestion for consideration in the adoption of more uniform potential taking. The taking of oil potentials, under most methods used in the past, has resulted in greatly inflated estimates of the amount of oil that could be produced. These exaggerated figures have been most destructive to the price of crude oil and have assisted in the rapid decline of values of oil properties in general throughout the United States.

"The true potential of any pool should be the amount of oil that could be produced by simultaneous and continued operation of its wells. This operation should be in the man-[fol. 347] ner which would give the greatest recovery of oil over the life of the field, with tests continued after the accumulated head had been removed. Conditions in different fields vary as to the time to remove the accumulated head of oil from new or shut-in wells but 48 hours continued operation could usually be expected to reduce pressures and flows to normal in open wells.

"At present the tendency is to drill wells too deep, in the effort to get the greatest potential, which frequently is injurious to individual and group wells.

"Potentials should be established by a uniform method which adheres to the conditions under which the wells can be most economically and efficiently operated.

"At this particular time it is more important to the industry and the public that we agree on allowables rather than methods each state proposes to take to ascertain how

each oil well in field shall be guaged. That is a matter all of us can trust to the fairness of the oil regulatory bodies within the several states.

Allowables

"In order to secure a fair price for crude oil now being produced in the Mid-Continent fields the several states by their oil regulatory bodies here assembled pledge themselves to restrict the output of crude oil in said states as follows:

[fol. 348]

	Daily maximum bbls.
Texas	800,000
Oklahoma	550,000
Kansas	150,000
Arkansas	37,000
Louisiana	50,000
New Mexico	45,000
Rest of Rocky Mountain district	52,000
Eastern States	108,000
California	500,000
Importers	100,000
Total	2,392,000

"These suggestions will permit some withdrawals from storage which is admittedly larger than necessary for the good of the industry.

"The amounts set out herein are submitted from figures obtained from various reliable sources. However, it is not intended as being an arbitrary plan, but more as a guide to assist the states in arriving at allowable satisfactory to each state. It is important before we adjourn to pledge ourselves to an equitable allowable output.

Effective Date

"By and with the consent of the governors of our respective states, or the regulatory bodies in charge of oil conservation law enforcement, these allowables shall become effective on the fifteenth day of September, 1931.

[fol. 349] Question of Price

"The primary purposes of the oil states in curtailing production to conform to market demands are:

"1. To prevent physical waste.

"2. To secure the producer a fair price for his crude, and to the refiner and distributors a reasonable return.

"3. More royalties and rentals for the farmer, and

"4. Steady tax revenue for the states.

"Five years ago the mention of price in a meeting of regulatory bodies would have caused shivering and shuddering of spines. Conditions today require direct action. The federal court decisions forbidding states to fix oil prices are based on erroneous conclusions that oil and its derivatives are not tinged with public interest. After the past years' oil activities only an indifferent court, insensible to what is going on about it, would deny the public interest in oil. For instance, there are almost as many users of gasoline as of electricity—and the courts do not hesitate in permitting the states to regulate electric rates through our commissions.

"The greater reason for the several states to insist on a fair price is that oil is an irreplaceable resource.

"The price at which American producers can afford to sell oil is subject to argument and actual cost of producing varies between flush and settled pools.

"Perhaps the most authentic and exhaustive study of [fol. 350] production costs is contained in the report of the U. S. Tariff Commission (Senate Document 279 to the Seventy-first Congress, third session).

"After a long and thorough study of costs of producing oil by large and small producers in the Mid-Continent area, this commission reported average costs of a barrel of oil delivered above ground at wells to be $1.10. Profits must come from higher prices than actual cost of production. The common understanding of prices has been based on 36 gravity oil usually with 2 cents added for each degree above and 2 cents subtracted for each degree below.

"If we here assembled can agree upon the maximum amount of oil each state will be permitted to produce, and have co-ordination in like manner with importers, it should

be understood and carried out as a states gentlemen's agreement.

"This curtailment policy is contingent upon the above suggested fair price being paid within 30 days from September 15, 1931. After we have agreed on allowables for our states and importers, if crude prices do not conform to our suggested fair price, then 30 days from September 15, 1931, and each 30 days thereafter, each regulatory body present and each importing company promise to reduce allowables recited herein automatically 10 per cent each month until said fair suggested price is secured."

Texas is Blamed

Wirt Franklin, whose work as a conservationist goes [fol. 351] back to the days of Cushing and Healdton and who was one of the prime movers in giving Oklahoma a conservation law tight enough in its provisions to stand the tests of the courts for 16 years, said that if anything is to be accomplished there must be some self-sacrifice. Selfishness which has fought conservation up to now must be set aside. Each state must give up to some degree for the general welfare of all. Oklahoma, he said, had cut its actual production from 750,000 bbls. a day to less than half that quantity before martial law was put into effect in the larger fields. California had reduced its production from 800,000 bbls. down to 500,000 bbls. a day; Kansas is below 100,000 bbls. a day with a potential much in excess of that figure. Mr. Franklin put it up to Texas, which he said had increased its production 300,000 bbls. a day since the curtailment order was issued in that state. All that need be done is to keep production down to demand. The price will then take care of itself. At the present low prices it would be better if the oil remained in the ground a year or even two years. He called upon the importers to meet the issue by curtailing their imports commensurate with the curtailment in the flush fields of this country.

Roy Johnson spoke in favor of each state curtailing its production to the needs of its trade territory. In the past, he said, every state has tried to get all the production it can and to dump surplus oil into the trade territories of [fol. 352] other states, creating market demoralization.

E. B. Reeser said that until the public service commissions of the oil-producing states had taken hold of the conservation movement the public believed the movement was merely a fight among the oil companies. Now the public is coming to understand that it has an interest in the matter. In California the public is much interested and so much so that at a union labor meeting in Los Angeles resolutions were passed expelling from the union any member that bought gasoline at a cut-rate station. The people of Kansas, Oklahoma and Texas have yet to realize the importance of the gross production tax, he continued. The states depend largely on the oil industry for funds to run the government and if gross production taxes are low the money must come out of the people through some other form of taxation. The speaker said that 90 per cent of oil producers are in favor of production conservation. Ten per cent have acted as stumbling blocks to the success of the movement. All oil-producing states are in line excepting Texas. Mr. Reeser thought the Texas legislature should be censured for its failure to pass legislation that would make conservation effective. The confused state of oil affairs in Texas has brought about the present demoralization in the industry, Mr. Reeser said. "We would have had stabilization had it not been for the fear of a blow-up in Texas," he concluded.

[fol. 353] Importers Heard From

W. S. Farish, president of the Humble Oil & Refining Co. said the oil industry was in no different position from any other basic industry. They have all overproduced. The machine age has made it possible for every individual to overproduce. The oil business differs from other business, however, in that if it overproduces it commits waste because it overproduces an irreplaceable commodity. Ever since President Coolidge inaugurated the movement for oil conservation we have been charged with wastefulness. The only way we can have prosperity in the oil business is through orderly production of crude oil. We have 650,000,000 bbls. of crude and refined oil in storage, he said, and we do not want any more. The structure is top heavy with stored oil. We must reduce these stocks. Oil in the ground is stored oil. Owners of oil in storage tanks do not want

to sell it at present prices, then why should owners of oil in natural storage—the earth—sell it at ruinous prices? Mr. Farish said the Standard Oil Co. of New Jersey, of which his company is a subsidiary, has reduced its imports. In 1931 it will import 2,000,000 bbls. less than in 1930, and 4,000,000 bbls. less than in 1929. Its imports this year will average about 54,000 bbls. per day.

Rush Greenslade, vice president of the Gypsy Oil Co., a subsidiary of the Gulf Oil Corp., said the Gulf organization imported only crude oil. In 1930 it imported a daily aver- [fol. 354] age of 65,605 bbls.; in 1929 79,077 bbls. but in July and August of this year the company had reduced its imports to 36,000 bbls. and 33,000 bbls. per day, respectively. This reduction, he said, has been made without any agreement with any other company. The company based its action on the principle of good business, he said.

Thomas F. Lydon, vice president of the Shell Petroleum Corp., assured the commissioners that the Shell organization would go along with any program of conservation that was agreed upon.

A. W. Peake was invited to speak for the Standard Oil Co. of Indiana. Mr. Peake said he had accepted the invitation to be present under a misunderstanding of the objects of the meeting. The invitation should have been sent to the president of the Pan American Petroleum Corp., which is the importing subsidiary of the Standard Oil Co. of Indiana, and he did not feel that he was in a position to speak for that company.

Governor Murray Speaks

Governor Murray was invited to address the meeting and he spoke for 30 minutes. He defended his action in declaring martial law in order to shut down flush oil fields in Oklahoma until what he considered a fair price for oil had been established in the State. The governor, who spent several years in South America, said that continent was a great storehouse of oil and could supply the world. Proven [fol. 355] oil fields in Peru and Bolivia were shut in awaiting the time when the oil could be put on the market profitably. Venezuela and Colombia had tremendous oil fields. It was well for American oil men and the American people to know this and guard against the flood of oil that could be poured into this country from the countries to the south.

It took only a very small force of soldiers to shut down Oklahoma oil fields, he said. Oil men's respect for government and not their fear of the soldiers made it possible to use only a handful of men in the execution of his orders, the governor said.

World Production

The Oil States Advisory Committee approved of estimates on the domestic production necessary to meet the needs of refiners for the year- 1931, 1932, 1933 and 1934 as follows: 1931, 531,000 blls. per day; in 1932, 594,066 bbls. 1933 2,479,433 bbls.; 1934, 2,555,449 bbls. This program proves for a certain quantity of crude and refined withdrawals from storage as follows: In 1931, 22,000,000 bbls., an average of 60,274 bbls. per day; in 1932, 71,000,000 bbls., a daily average of 193,989 bbls. per day; in 1933, 75,000,000 bbls., a daily average of 208,219 bbls. per day; in 1934, 80,000,000 bbls. a daily average of 219,178 bbls. These figures represent a percentage decrease of 1.75 in 1931, 5.42 in 1932; 5.63 in 1933 and 5.74 in 1934.

The committee estimated the production of South Amer- [fo- 56] ican and New Mexican oil in the four years as fo- 1931, 531,000 bbls. per day; in 1932, 594,066 bbls. 1933 613,699 bbls. per day; and in 1934, 633,521 bbls. per day. Europe outside of Russia and Sakhalin in 1931, 158,000 bbls. per day; 1932, 108,503 bbls. per day; 1933, 112,085 bbls. per day; 1934, 115,707 bbls. per day. Russia is allowed the following: In 1931, 474,890 bbls. per day; 1932, 572,133 bbls. per day; 1933, 673,395 bbls. per day; and 1934, 773,088 bbls. per day.

The combined production of Asiatic fields and all others outside of the Western Continent and Europe is projected as follows: In 1931, 295,959 bbls. per day; in 1932, 271,787 bbls. per day; in 1933, 280,772 bbls. per day; and 1934, 289,-838 bbls. per day.

World production based on the figures adopted by the advisory committee would be, in 1931, 3,920,123 bbls. per day; in 1932, 4,153,005 bbls. per day; in 1933, 4,372,603 bbls. per day; and 1934, 4,591,781 bbls. per day.

Chairman Murray's Report

Chairman Cicero I. Murray announced that as to the balance of 1931 it was agreed that the domestic figures for

1932 would be placed in effect for October, November and December of this year, but just as a test for thirty days and subject to revision if it should develop that the demand is below production, and that crude is being stored. A [fol. 357] committee will confer with the Texas Railroad Commission on September 18 and a committee will then go to Washington to confer with the Federal Oil Conservation Board to get its approval, and also with Secretary Lamont as to securing some statement from importing companies as to curtailment of production in South America, and of imports. The program, he said, would also be submitted to the American Petroleum Institute for approval and in the meantime producing companies in all the foreign fields will be conferred with to bring about a world wide curtailment program and to put into effect a definite three-year program.

Complainants rest.

Mr. Page: If the Court please, the theory of the defendants' case is that the plaintiff makes out no case of violation of any law or any statute, and especially makes out no case of violation of the Fourteenth Amendment to the Constitution of the United States. There is a part of the defendants' answer which is, perhaps, most important evidence in this case, which I will ask leave to read to the Court, if it is not too voluminous. We introduce at this point, in evidence, the answer of the defendants to the plaintiffs' petition, and first amended original bill of complaint.

The Presiding Judge: Is it sworn to?

Mr. Page: Yes, sir, by all three defendants whom I represent. I will read this in connection with the amend- [fol. 358] ment submitted to the Court this morning by agreement of counsel.

(The defendants, R. S. Sterling, Jacob F. Wolters and W. W. Sterling, then introduced in evidence their answer together with the amendment to same, to the plaintiffs' first amended original bill of complaint, which appears in this record on pages 83 to 144 and 151 to 154.

(The defendants, The Railroad Commission of Texas and the Attorney General of Texas, then introduced in evi-

dence their answer for the purpose of showing that the Railroad Commission is not now, and is not attempting or threatening to pass or enforce any order affecting the property of the plaintiffs in this case, and that the Attorney General is not threatening to sue them, which answer appears in this record on pages 145 to 150.)

Judge Bryant: Is it admitted that the orders of the Railroad Commission described in this other evidence were in full force and effect at the time this temporary restraining order was issued?

Mr. Hooper: Yes; well, there were some orders in effect at that time.

Judge Bryant: Is it admitted that the defendant Wolters was enforcing the execution of those orders at the time of the issuance of this restraining order?

Mr. Hooper: Yes; I think they so allege in their answer.

[fol. 359] (The defendants, R. S. Sterling, Jacob F. Wolters, and W. W. Sterling, then introduced in evidence the whole of the cross-examination of R. S. Sterling, as indicated by his deposition, which is as follows:)

Cross-examination.

By Mr. Smith:

I think it is a known fact that the oil industry in regard to capital employed and men employed in carrying on the industry, is the greatest industry in the state outside of the agricultural industry. As Governor of Texas I was vitally interested in seeing that industry prosperous, as well as all other Texas industries, and that was my purpose in those conferences that I had and that I knew were being held by other persons in regard to the critical situation the oil industry was in. In fact, there has been legislation at a called session of the Legislature to try and help the cotton industry over the state, which is down in the dumps as well as most everything else.

There was also a called session of the Legislature in regard to the oil situation, called to pass conservation laws to conserve oil and gas of the state and other natural resources. The session was not called purely as an oil session, although it practically developed into that before they got through. After that special session of the Legislature,

I, as Governor, called another special session and submitted [fol. 360] to the Legislature matters in regard to the cotton situation. There was a striking similarity between the cotton situation and the oil situation in regard to overproduction. In fact, the Legislature passed a law to curtail or limit the acreage planted to cotton in Texas, and I, as Governor, approved that law. Counsel refers to a letter of March 10, 1931, from Honorable Herbert Hoover, President of the United States, in which he says: "I have your telegram of March 5th." I do not think that telegram has been introduced. I find here a copy of my telegram of March 5th.

(The defendants R. S. Sterling, Jacob F. Wolters and W. W. Sterling, then introduced in evidence telegram from Governor Sterling dated March 5, 1931, to President Hoover, which is as follows:)

Postal Telegraph

Day Letter

March 5, 1931.

President Herbert Hoover, Washington, D. C.:

You are familiar with the critical oil situation in midcontinent fields and efforts being made by Governors of States affected to find solution of problem and work out somewhat uniform program Stop Standard of Indiana has just announced crude price cut in this territory Stop Fear this will upset entire program Stop Felt I should call matter to your attention for your consideration and such helpful action as you may find possible to take.

R. S. Sterling, Governor.

[fol. 361] (The defendants, R. S. Sterling, Jacob F. Wolters and W. W. Sterling, then introduced in evidence letter dated March 10, 1931, from President Hoover to Governor Sterling, which is as follows:)

The White House, Washington

March 10, 1931.

The Honorable R. S. Sterling, Governor of Texas, Austin, Texas.

My Dear Mr. Governor: I have your telegram of March 5th. As I informed you, Secretary Lamont is negotiating

with the principal importers with a view to securing co-operation from them in pro ratio. They are having a meeting today and I am in hopes of favorable results.

Yours faithfully, Herbert Hoover.

Counsel has handed me a telegram of date March 3rd, signed by myself, addressed to Robert P. Lamont, Secretary of Commerce, or rather, a copy of that telegram. I sent the telegram of which this is a copy. Attached to that copy of telegram which counsel has handed me is an original telegram from M. Kerlin, Administrative Assistant to [fol. 362] the Secretary, dated March 23, 1931. I received that telegram.

(The defendants R. S. Sterling, Jacob F. Wolters and W. W. Sterling, then introduced in evidence the telegram identified by the witness, to Robert P. Lamont, Secretary of Commerce, dated March 23, 1931, which is as follows:)

Postal Telegraph

March 23, 1931.

Robert P. Lamont, Secretary of Commerce, Washington, D. C.:

Will you kindly telegraph detailed report on negotiations with the importing oil companies showing just what each has agreed to do up to date stop Would like to have this by tomorrow morning on account of important proration hearing before Railroad Commission.

R. S. Sterling, Governor.

(The defendants R. S. Sterling, Jacob F. Wolters and W. W. Sterling then introduced in evidence telegram from M. Kerlin, Administrative Assistant to the Secretary, to Governor R. S. Sterling, dated March 23, 1931, which is as follows:)

Western Union

1931 Mar. 23 P. M. 3 06.

D 169 32 Govt.—F Washington D. C. 23 344 P.

Hon. R. S. Sterling, Governor, Austin, Tex.:

[fol. 363] Secretary Lamont personally handled negotiations regarding importation of oil. He is absent from

city for few days and can not be reached. We therefore regret it is impracticable to furnish you information desired.

M. Kerlin, Administrative Assistant to the Secretary.

The Witness: That was in furtherance of the efforts I was making to conserve the natural resources of the state, particularly oil and gas.

As a practical oil man I would say that it is true when oil is stored, however carefully it may be stored, there is considerable loss from evaporation of light particles of the oil. Sometimes it runs as high as six to ten per cent, depending upon the character of the oil.

In all of the efforts that I was making about which I have testified, in regard to these conferences, one at FortWorth with Governor Murray and others, and the request I made of Mr. Penn to be present at a conference at Texarkana, and my sending Mr. Thomas as my representative to attend a conference at Oklahoma City, and the conference held here in Austin on or about September 18th, my purpose in all those efforts was to conserve the natural resources of the state, oil and gas. In none of those conferences did I ever hear any one even suggest that martial law should be declared in Texas or elswhere in order to try to help the [fol. 364] situation. I never did agree with any of the gentlemen with whom I had conferences, Governor Murray nor any one else, that I as Governor of Texas would declare martial law in order to conserve oil and gas.

Counsel refers to the fact that I mentioned a telephone conversation that I had with Mr. Gus Taylor of Tyler. That conversation was in reference to the mass meeting that was held in Tyler just before martial law, in which Mr. Taylor told me that there was liable to be serious trouble if something was not done, and that there was likely to be blowing up of pipe lines. Mr. Taylor is a banker at Tyler. At that time he suggested or urged me to declare martial law; he thought that something ought to be done along that line to protect the interests of the people over there and keep them from being in a riotous state.

Mr. Smith: We then introduced and the Governor identified, possibly some forty or fifty petitions which he had received from people residing in these four counties. I

will state to the Court that I, myself, counted the signatures to these petitions, and I have forgotten the exact figure except that it is something more than eleven hundred citizens that signed these petitions requesting the Governor to declare martial law in East Texas.

Judge Bryant: Do you know the relation of these signers to the industry within that section?

Mr. Smith: No, sir; I do not.

[fol. 365] Judge Bryant: Do you know the relation of any particular group or number of individuals?

Mr. Smith: No, sir; I do not. I have only been up in the East Texas field on two occasions for two or three hours at a time.

The Presiding Judge: The petition does not identify them as to what their status is, who they are working for?

Mr. Smith: Let me see: "We, the undersigned oil producers and land and royalty owners of the East Texas field including Smith, Rusk, Upshur and Gregg Counties."

The Presiding Judge: That is, people interested in conservation?

Mr. Smith: Yes, sir; that is the beginning. Now, I will read, if I may, one or two paragraphs from one of these petitions; there are two different forms used, and the Governor testified he did not know who prepared these petitions or who circulated them, but they were circulated throughout the four counties, and each petition had at the top of it, I believe, that certain section, the Overton list, the Tyler list, the Rusk list, identifying the location of the county in which the people who signed this petition resided.

"Tyler and Overton List

"To the Honorable Ross S. Sterling, Governor of Texas:

"We, the undersigned oil producers, and land and royalty owners of the East Texas field, including Smith, Rusk, Upshur and Gregg Counties, hereby petition your [fol. 366] Excellency to issue an order shutting down the production of all oil and/or gas wells in said counties, and declare martial law to enforce said order for the following reasons, to-wit:

"That there is great physical waste being permitted in said field by the following manner, to-wit:

"Wells are being operated with a gas and oil ratio in such a manner as to waste and destroy gas pressure of the field, and is destroying millions of cubic feet of gas daily; that by reason of the excessive production of oil in many wells being operated by selfish, greedy purchasers, and premature intrusion of water into wells producing from the same strata is resulting.

"That the natural gas is wastefully being burned and destroyed in all sections of the field, preventing utilization of natural gas both in commercial quantities and in the lifting of the oil from the wells in the East Texas field.

"That unnecessary fire hazards have existed and are still existing in the field, which has resulted in the loss of life of many oil workers, and has destroyed millions of dollars worth of property.

"That excessive production of oil from any well offsetting and adjacent to wells of independent operators, which have not yet been connected to pipe lines, is resulting in the trapping of oil, and in the draining of oil from under the wells not connected to pipe lines.

"That great waste is resulting, which is incident to the [fol. 367] inequitable utilization of gas energy and water drive, or other natural forces, which is a result from inequitable withdrawal of oil from the pools.

"That the purchasers of oil have failed and refused, and still fail and refuse to pay the lease owners and the royalty and land owners the money which has been due them for many months; that by reason thereof, undue hardship, economic loss, and destruction of private property has resulted, and unless all wells are shut down, will result in still greater loss to the people of East Texas.

"That farm owners in the oil producing area have been forced to vacate their home and fireside and move into nearby cities and towns to permit the drilling and producing of oil and gas from wells under their home and by reason of the failure to pay them the money due, some of which has been due for eight months, that those farmers and their families are being deprived of food and clothing, although they may be the owners of untold oil wealth.

"That foreign corporations are robbing, devastating, and forever destroying the great wealth which should inure to the citizenship of the State of Texas by taking oil at the

rate of eight hundred thousand barrels per day in the East Texas fields, and refusing to pay one-tenth of its value, thus depriving the lease and royalty owners and land owners of their just and fair prices for the oil, and deprivi- [fol. 368] ing the State of Texas of thousands of dollars of taxes.

"That, by reason of the chaotic conditions created, fostered and engendered by common purchasers of oil in conjunction with brokers and others interested therein, that the oil producers, royalty and land owners of East Texas are being deprived of hundreds of thousands of dollars daily, and the natural resources of the State of Texas are being rapidly destroyed and depleted for the greed and unsatiable desire of a few oil producers who are enriching their coffers in violation of every moral and legal code known to men.

"That the physical and economic loss resulting thereby is the most open, flagrant, diabolical violation of the anti-trust laws of the State of Texas and Nation ever perpetrated upon a free citizenship of any Republic, which acts are sufficient to cause loss of life and property if not prevented. The illegal, unfair, unjust, inequitable, discriminatory, excessive taking of oil from wells of common purchasers, and the refusal to take oil from independent producers except at confiscatory prices, has engendered a feeling among the people of said counties, which may result in a great loss of property unless an order is entered shutting down the production of oil and gas until the rights guaranteed every citizen are fully protected."

Mr. Smith: Another form of the petition which the Governor received:

"STATE OF TEXAS,
County of Smith:

August 15, 1931.

[fol. 369] "We, the undersigned and each of us do hereby represent and affirm that the following facts herein set out are true and correct to the best of our knowledge and belief:

"That we have heard rumors and in cases have been told by royalty owners, land-owners and operators and others, of threats of violence in the oil fields of Rusk, Gregg, Smith, and Upshur Counties, Texas;

"That threats have been made to blow up pipe lines, storage tanks, loading racks and tank cars and fire wells. Also by some operators that they would turn their oil down the creeks.

"We believe there is grave danger of these threats being carried into effect, unless Martial Law is declared immediately."

The Witness: I received a telegram of date August 14th, addressed to Hon. Ross S. Sterling, Governor of Texas, signed J. F. Lucey, Chairman, W. Lewey Lawrence, Secretary. The telegram handed me by counsel is the one that I received; this petition was wired from that mass meeting that was held in Tyler; that is, the resolution.

Mr. Smith: Now, that telegram was introduced in evidence and, if I may, I will read it to the Court.

Postal Telegraph

Tyler Tex 14 509 P 1931 Aug 14 PM 6 15.

Dpl 753 DL 4 Extra 1/141.

Honorable Ross S. Sterling, Governor of Texas, Austin, Texas:

[fol. 370] Fifteen hundred oil operators and royalty owners today in mass meeting by unanimous rising vote passed the following resolution with instructions to wire it to you immediately Quote Resolution adopted at mass meeting of producers and royalty owners of East Texas area on August 14th, 1931, Whereas, the Legislature has enacted a new law looking to the conservation of the natural resources of this State and the prevention of the physical waste of oil and gas, and whereas it will be impossible for the Railroad Commission under the terms of said law to prepare a proper order thereunder to effectuate the principle of said law and put the same in active operation in less than fifteen days; and Whereas, there is now no effective order of the Railroad Commission or law of the State to prevent the actual waste of these important natural resources of the State by reason of injunction suits and other vexatious and dilatory forms of litigation which have resulted in widespread violation of said present orders and existing law and that such chaotic condition will continue during the period necessary to pass and put into——"

The Presiding Judge (interrupting): Why couldn't you just have said that they would just have to do something while all this was going on and that they asked him to do it and he did it?

Mr. Smith: All right. And the telegram goes on and says that unless martial law is declared, violence is certain. [fol. 371] The Presiding Judge: Is that in the vote or is that just their individual opinion?

Mr. Smith: That is in the resolution.

The Presiding Judge: They didn't vote on the question of violence?

Mr. Smith: I don't know.

The Presiding Judge: Does the resolution say that the mass meeting voted that violence would occur?

Judge Grubb: They all voted unanimously, didn't they?

Mr. Smith: Mr. Lucey wired the vote that was passed, whether it was by majority vote—I believe it states unanimous vote, by unanimous rising vote; they all voted and all stood up, Judge, as heartily in favor of it. I believe right here, if I may, I will read a few questions and answers to give——

Judge Bryant: Captain Lucey has taken a very active part in the advocacy of this proration program?

Mr. Smith: Judge, again, I don't know.

Judge Bryant: Don't you know that to be a fact?

Mr. Smith: I don't, personally; no, sir.

"Operations will continue unabated and in all probability will increase, working undue and unreasonable hardships on that great majority who are complying with the present orders of the Railroad Commission under the existing law; and Whereas, such unequal production and taking which are now existent and which will continue until new and effective orders have been established and which is now [fol. 372] causing great physical waste of the natural resources of oil and gas which are rightful property of the State of Texas and are causing great loss to the State of Texas not only of the natural resources itself, but in taxes, both gross production and ad valorem, and depleted revenues rightfully belonging to the school and university funds of the State, not alone in the revenues from producing properties, but also the great loss which will result

from the sale of mineral rights on the large areas of undeveloped lands belonging to the school fund and the university of Texas which are integral parts of the State Government itself; and Whereas, the present unequal production and taking has and will during the interim until the new law can be made effective by the Railroad Commission caused undue physical waste in the loss and depletion of gas pressure and energy necessary to produce the greatest ultimate recovery of these natural resources and loss caused by rapid intrusion of salt water and in the coning and trapping off *of* underground of great quantities of said minerals and the loss due to the burning of gas from the wells without extracting therefrom the large gasoline content; and Whereas, these conditions have already resulted and caused threats of violence and the destruction of property and a further continuance may, in all probability result in actual destruction of property and a reign of lawlessness and as evidence thereof may be noted the tendency to a let down in the general enforcement of all conservation laws [fol. 373] of the State and ruthless and unheeded violations of the same; now, therefore be it resolved that in order to prevent this irreparable waste to the State of Texas and so that an equitable and unhampered basis of production may be fixed before the fact instead of after the fact and that unequal production and the consequent loss may be prevented during the time necessarily incident to determining passing and putting into operation of a new and effective order of the Railroad Commission under the new law, respectfully petition and urge his Excellency, The Honorable Ross S. Sterling, Governor of the State of Texas, that he forthwith and immediately declare martial law in the oil producing territory of Gregg, Smith, Rusk and Upshur Counties, Texas, to the end that the present enormous physical waste may be eliminated and huge loss to the State of Texas prevented and that life and property may be safe during this hiatus of the conservation laws of the State and that said martial law be maintained and oil production completely shut down in said area for and during the reasonable period necessary to put into effect the new order under the new law.

"J. F. Lucey, Chairman. W. Lewey Lawrence, Secretary."

The Witness: I instructed General Wolters to obey the orders of the Railroad Commission in carrying out that 225 barrel per well per day order that the Railroad Commission had entered. I caused the military forces in the military [fol. 374] district to continue to obey the Railroad Commission in the enforcement of its order of 225 barrels up to October 13th, 1931.

Counsel refers to the fact that on October 13, 1931, this suit was filed in the United States District Court for the Eastern District of Texas, Tyler Division. The only communication I received in regard to this suit on October 13th, was indirectly. There was a rumor phoned to me out of Dallas. My recollection is that Mr. Guiberson phoned me that it was rumored in Dallas that the field was going to be turned wide open, and he was very greatly excited about it. That was the first I heard. When I received that information I called General Wolters and asked him if he knew anything about the situation. At first he had not heard of it. Later on he phoned me and said that the Tyler papers were carrying something about an injunction going to be issued, or was issued, or something of the sort, on these five certain wells; they were to open up at five thousand barrels per well, and he gave the description of the leases and so forth. General Wolters at that time advised me over the phone that in his judgment if those wells were permitted to open there would be a riotous situation over there; that they would blow up pipe lines and destroy the field, and likely to be a good deal of loss of life and so forth if the field were opened up. I then told General Wolters to keep the wells closed in to the amount allowed by the Railroad Commission. In taking that action it was my purpose to maintain law and order and prevent insurrec- [fol. 375] tion, riot, tumult, and breach of the peace. I did not issue that order to General Wolters in any attempt to evade or disobey the injunction of the United States Court that I had heard about. I issued the order in order to keep the situation from becoming terrible in East Texas, as I knew what would happen if it was allowed to flow wide open.

Judge Bryant: Do you make any admission in your answer or otherwise, Mr. Smith, about how long prior to the issuance of that temporary restraining order the mili-

tary authorities had been acting in obedience to the orders of the Railroad Commission?

Mr. Smith: I don't believe that we make any statement about that, but I frankly say that it is my understanding that the military had been aiding the Railroad Commission from the time the orders became effective; that is my understanding.

Judge Bryant: Now, as a matter of fact, hadn't the military been acting in obedience and pursuant to the orders of the Railroad Commission from the time, or approximately the time the orders of the Railroad Commission became effective, to and inclusive of the date of the issuance of this temporary restraining order?

Mr. Smith: Judge, I believe that I will ask you to ask that question of some of the witnesses we will put on, and let me make this statement in that connection: I had no connection with martial law in East Texas until after this [fol. 376] suit was filed and the injunction issued; then I was employed by the Governor of Texas, and my information in regard to it is hearsay as to anything that happened before that, and much of it hearsay as to what has happened since.

The Presiding Judge: You are not prepared to make a statement for the record on that point at all?

Mr. Smith: I would prefer not, Judge, because it might be incorrect. Here is a resolution passed by the Longview Chamber of Commerce of date October 27, 1931.

Mr. Bailey: If the Court please, I have no objection except to shorten this record and to save the Court's time, but certainly a resolution passed on the 27th day of October, long after the proclamation, long after the suit, long after the injunction, will certainly not be any evidence in this case as to what the Governor acted upon on the 16th day of August.

The Presiding Judge: He issued a good many other orders and you have an amended petition coming down to December. Let him put them all in.

Mr. Smith: If the Court will permit me to state, my thought is to try to show the Court what information the Governor had, whether it was correct or incorrect.

The Witness: Counsel has handed me a telegram addressed to Governor Ross S. Sterling, Austin, Texas, of

date September 1st, signed by J. S. Murchison. I received that telegram.

(The defendants, R. S. Sterling, Jacob F. Wolters and [fol. 377] W. W. Sterling, then introduced in evidence the telegram identified by the witness, which is as follows:)

Western Union

D 99 48 DL—Corsicana Tex 1 228 P.

1931 SEP 1 PM 2 42.

Gov. Ross S. Sterling, Austin, Tex.:

Hope you were not correctly quoted in morning papers as supporting purported order of Railroad Commission Stop Such an order would spell disaster Stop Please do not life martial law in East Texas since this order means violence Stop Think you should put your own order into effect

J. S. Murchison.

The Witness: Counsel has handed me a resolution of the Longview Chamber of Commerce, Longview, Texas, dated October 27, 1931, signed Longview Chamber of Commerce, G. A. McCreight, President, attested by M. D. Abernathy, Secertary, and up at the top is written with typewriter: "Dear Governor: For fear you miss this otherwise, I hand you my copy for your information and advice. Most respectfully, Gainer." That may be Senator Gainer; I guess that is who it is. I am sure it is Senator Gainer. I received that communication.

(The defendants, R. S. Sterling, Jacob F. Wolters and W. W. Sterling, then introduced in evidence the resolution identified by the witness, which is as follows:)

[fol. 378] "Dear Governor: For fear you miss this otherwise, I hand you my copy for your information and advice. Most respectfully,

"Gainer."

"Longview Chamber of Commerce, Longview, Tex.

"October 27, 1931.

"To all whom these presents shall come:

"Whereas, the Governor of the State of Texas, under his Proclamation No. 8447, under date of August 13th, 1931,

declared Martial Law in the Counties of Upshur, Gregg, Rusk and Smith, and

"Whereas, the City of Longview is in said district, and

"Whereas, we, the officers and members of the Longview Chamber of Commerce, and citizens of the County of Gregg, heartily endorse the action taken by the Governor because we believe at the time prior to the declaration of Martial Law there were threats of outbreak, acts of violence on the part of indignant responsible citizens of this city, and other parts of the county against those who openly, flagrantly and rebelliously violate the laws of the state and disobey the constituted civil authorities of the State of Texas, and a state of insurrection, riot and breach of the peace existed, and

"Whereas, Brigadier General Jacob F. Wolters was sent [fol. 379] by the Governor in command of this martial law area, and in our opinion has faithfully and impartially carried out the orders of the Governor to the interest of all concerned, and

"Whereas, on the 13th day of October, 1931, certain operators within this Martial Law area saw fit to appear before Federal Court and ask for an injunction restraining the employees of the Railroad Commission and General Wolters from carrying out the Railroad Commission's orders, which injunction was granted by the Federal Court, permitting the opening of the wells of the parties seeking the injunction, and

"Whereas, at the time the order was issued there was a sense of feeling among producers of this area to the effect that if these wells were permitted to be opened, that their wells likewise should be opened, and were ready at any time to open them, and

"Whereas, with this feeling existing among the operators, we believe the citizens, land-owners, royalty owners, and taxpayers of this County becaᵘse very apprehensive as to what would happen if such condition should exist, and were preparing themselves to protect their property in any manner they could, by force of violence in destruction of property and loss of human life, or in any other manner to protect and save their property, and,

"Therefore be it resolved, that this organization with its standard of civil pride, and strong support of public [fol. 380] safety and welfare of its citizens, and a strong

demand for obedience of all laws, do most heartily commend and pledge our support to the Governor of the State of Texas, for his action in placing Martial Law in this district, and to Brigadier General Jacob F. Wolters, his officers and men, for their faithful performance in carrying out the orders issued to them, which in our opinion averted and prevented disturbance, riot, destruction of property and loss of human life and helped the people of this section to protect their property, and prevented the return of the conditions that existed before or prior to the placing of Martial Law in this district, and

"Be it further resolved, that copies of this resolution be forwarded to the Governor of the State of Texas, the Adjutant General of the State of Texas, Brigadier General Jacob F. Wolters, his officers and men, and to the press.

"Longview Chamber of Commerce, C. A. McCreight, President.

"Attest: M. D. Abernathy, Secretary."

The Witness: Counsel has handed me a letter dated November 6, 1931, addressed to Honorable Ross S. Sterling, Governor of Texas, signed W. R. Hughes, County Judge, from Longview, Texas. I received that letter.

[fol. 381] (The defendants, R. S. Sterling, Jacob F. Wolters, and W. W. Sterling, then introduced in evidence the letter identified by the witness, which is as follows:)

"The State of Texas, County of Gregg

"Longview, Texas, November 6th, 1931.

"Hon. Ross S. Sterling, Governor of Texas, Austin, Texas.

"My Dear Governor Sterling: I desire to express my genuine appreciation of the courteous consideration shown the delegation of our citizens who recently appeared before you against any change in the present proration. Under present conditions we have harmony and team work and I believe a fairly complete proration, and I believe from observation here, that to change the existing condition would surely invite grave danger, and strife. I believe in making your decision to let the present condition remain, you have rendered our section, its great industry and the peace and order of the State, a great service.

"Assuring you again of my profound appreciation of this service, and courtesy, I remain,

"Very respectfully yours, W. R. Hughes, County Judge."

[fol. 382] The Witness: Counsel has handed me a letter from Kilgore, Texas, October 20, 1931, signed by Jacob F. Wolters, Brigadier General, Texas National Guard, and attached to that letter are copies of other communications received by General Wolters. I received that letter and the enclosed communications from General Wolters.

(The defendants, R. S. Sterling, Jacob F. Wolters and W. W. Sterling, then introduced in evidence the letter identified by the witness, together with the attached communications which General Wolters had received and transmitted to the Governor, all of which are as follows:)

"Headquarters Military District of Upshur, Rusk, Gregg, and Smith Counties

Camp Parrish,
Kilgore, Texas, 20 Oct., '31.

"Governor R. S. Sterling, Austin, Texas.

"My Dear Governor: In addition to numerous people that have talked to me in person and by telephone, regarding the danger of riot in the event the wells were opened, I am enclosing you copies of letters received. The County Judge and County Commissioners of Gregg County and the other signers are well known citizens. The signers of [fol. 383] the letter from Henderson are among the prominent citizens of that county. While only one signed it as a royalty owner, I know that others are likewise interested.

"Yours very cordially, Jacob F. Wolters, Brigadier General, T. N. G."

(Copy)

"The State of Texas, County of Gregg

Longview, Texas, October 19, 1931.

"Brigadier General Jacob F. Wolters, Camp Parrish, Kilgore, Texas.

"My Dear General Wolters: I have been very much concerned of late as to the resulting effects of the injunction

recently granted by Federal District Judge Bruant of Tyler, nullifying the Railroad Commission's order as to the Brock Lee wells, opening up the same to full capacity.

"As a land owner, royalty owner, citizen and public servant, I can not help but feel, and I believe that this action of the Federal Judge can have but one result, and that is if permitted to stand or if extended to other producing wells, that immediately it becomes effective we will have in [fol. 384] this entire field the same conditions which obtained here prior to the declaration of martial law and the shutting in of the wells. At the time martial law was declared and the wells shut in, it was generally known that there was deep-seated feeling on the part of our people generally that their property was being taken from them in a manner that was little less than confiscation of their resources. Many of our citizens expressed themselves to me, that they not only deplored the condition then existing and felt that they were being robbed of their inheritance, but that they were willing to act with others if necessary to putting a stop to it. On several occasions when our citizens talked with me along this line they expressed themselves as willing to resort to the shotgun if necessary to stop this waste of their resources. I advised them, of course, not to do that, that the only way out of the difficulties was by the action of the Governor of shutting in the wells and by reducing production in these fields. The state of popular mind among considerable number of our people was such that with the least agitation they would readily have attempted a shut down by force. The fact is that the action of the Governor in declaring martial law came barely in time to save a revolution among our people. If that condition had existed for a week longer, I think we would have had open violence and perhaps loss of life on the part of the people to protect their property from useless, needless [fol. 385] waste.

"In the event the wells are opened and this same condition returns, as it undoubtedly will if the wells are opened, I feel we will have such a state of public mind in resistance to the operation of these wells at full capacity that violence may be expected and that great damage to property and to life may result.

"As a royalty owner and land owner and public official, I believe the only thing that can give the people as-

surance of reasonable protection and preservation of their property and a fair price for their oil is to maintain in effect our present system of control. I trust that in your efforts to serve and maintain peace and order you will do whatever is possible to continue in effect proration as we have it at present.

"Very respectfully yours, W. R. Hughes, County Judge, Gregg County, Texas.

"P. S.—We, the undersigned, heartily endorse the above statements of Judge Hughes.

(Signatures:) W. E. Jones, County Surveyor. Leo Bradshaw, County Commissioner. J. S. King, County Commissioner. B. C. Todd, County Commissioner. W. A. Nicholson, J. C. Barton, Bell [fol. 386] Smith, C. A. Loftis, E. C. McCarty, J. L. Scogin, Bert Erwin (?), J. F. Stuckey."

(Copy)

"A. P. Noyes, Henderson, Texas

October 19, 1931.

"Brig. Gen. Jacob F. Wolters, Camp Parrish, Kilgore, Texas.

"Dear General: We have noticed in the papers and from numerous reports that a Federal injunction has been rendered by a Federal Court restraining you and the Railroad Commission from carrying out the latter's orders. As citizens, land owners and royalty owners of this military district, think that if this order of the Federal Court is carried out and martial law is lifted from this vast oil field the same conditions, that existed at the time you and your men came, will exist again. In our opinion the people of this district would rise up in arms to protect our prop- [fol. 387] erty rather than have those conditions exist again. Assuring you and your men our appreciation for the valuable service rendered us, we are,

"Yours very truly, (Signatures:) W. E. Wylie, R. J. Deason, M. H. Marwil, A. P. Noyes, Royalty Owner, R. T. Farmer, J. H. Spivey, M. D., L. W. Turner, D. F. Deason, J. E. Arnold, Rode Kangerga, Walter R. Smith, A. C. Wylie, H. L. Griffin, M. Kangerga, R. M. Griffin."

The Witness: Counsel has handed me a memorandum from General Walters to myself. I received this.

(The defendants, R. S. Sterling, Jacob F. Walters and W. W. Sterling, then introduced in evidence the memorandum identified by the witness, which is as follows:)

Memorandum from General Walters to Governor Sterling

Facts

Herewith are submitted some statements by citizens residing in the counties in which the East Texas oil field is located:

[fol. 200] C. O. Christian: "I reside on the Kilgore-Henderson road. I own property in the Bohl, Winn, H. McCabe and Whiteman Surveys, and some other property in Rusk County. I have interest in 17 wells located on the property. * * * There was a general feeling of dissatisfaction among the land owners generally, both at the price received for the oil and delay in receiving payment of royalties, and I have heard some talk about citizens wanting to bring about a shut down by force. I approve of the shut down of the field. I am a married man and have lived in Rusk County all my life." August 29th, 1931.

M. M. Cotton (colored): "The well on my place came in on May 2nd, 1931, and got pipeline connections on May 27th. I have never received any money for royalty. I have 22 3/10 acres of land. * * * I was born and raised at Overton. Am glad to see the shutdown as people were not getting anything for their oil and were rather dissatisfied." August 29th, 1931.

Wash Dickey (colored): "My children and I own 15 acres. My well came in sometime in May. The owner of the well told us that we would find out what they were running whenever we asked, but I do not know how much oil had been run from the well. I just got tired of looking, asking and waiting. I signed a division order a few days before the soldiers came. They did not tell me when they were going to pay, nor have they ever given me any paper of any kind to show how much oil they have run." August 28, 1931.

[fol. 389] H. P. Everett: * * * "The land owners I am acquainted with express great satisfaction at the Governor's action in shutting down the field. Before the shut down there was a great deal of dissatisfaction expressed by many people, some of whom were in an ugly frame of mind and rather in favor of closing wells down by force other than be deprived of the oil at such low prices." August 29th, 1931.

J. M. Plowman: " * * * Have heard dissatisfaction among all royalty owners nearly I know. Many think they are being robbed of their oil. Have heard a little talk that if things didn't change they might be some violence." August 24th, 1931.

J. W. Walter Shaw: " * * * Nearly everybody I know have failed to get their money and most have felt that they were being cheated out of their oil. During the last month there has been talk all over the district by responsible people even that if Governor did not close wells that people would have to take affairs in charge and stop wells. It is my opinion that if martial law had not been declared there would have been destruction of property and violence. In view of the situation all landowners I know were for Martial Law." August 26th, 1931.

C. H. Eaton: " * * * I have heard quite a lot of dissatisfaction all over the country before Martial Law and I have feared some violence and destruction of property. I [fol. 390] even now fear dynamiting of tanks and fires and I have a shotgun loaded to defend my property. I have made this statement voluntarily. * * *" August 25th, 1931.

M. C. Parris: "My name is M. C. Parrish and my home is Austin, Texas. I have been in Overton directing the First State Bank of Overton since April 1st. In this work, I have come in contact with hundreds of people from all sections of the oil field. Of course they have frequently discussed the oil situation with me and other officers of the bank.

They all charge the oil companies, both majors and independents, with unnecessarily holding up payments for oil royalties. Many have never received a dollar although several wells have been flowing on their properties since May

and early June. In fact, they feel like they are poorer now than before the oil boom.

Also they resent the oil companies disregarding the proration orders and running oil day and night while prices are the lowest in history. They feel they are seeing the only wealth they will ever have go and receiving not enough money to buy new cars or paint their homes or send their children to college.

Furthermore, many feel that companies are not honestly measuring the oil they take and that they will not receive all the royalty they are entitled to. Some talk of pipes [fol. 391] being connected which do not have measuring gauges and of other methods by which oil is being taken from them without payments.

In all, the situation was grave before the National Guard came, and land owners threatened that if the Governor did not shut the wells down, they (the landowners) would take matters in their own hands and shut them down.

Of course, I do not know about the correctness of any of these charges against the oil companies and in many instances I feel they are not true. However, these landowners, who are good responsible citizens, believe them to be true and were determined to protect their rights even by physical violence.

We have a peculiar situation here in East Texas. The land is owned to great extent in small farms by rather poor people with little education or business experience. The prices of oil has been so low that even at best the landowner has been disappointed at the amount of the royalty. He has heard the field called the greatest in the world and has expected to become rich. Consequently where he has gone for months with little or no payments, he has not been able to understand the reason. Also, land titles are in bad shape and the companies in many instances have had legitimate excuse for withholding payments. However, the farmer has not been able to see this as he reasons that if his title was not good the company would not have spent money drilling wells on his land.

[fol. 392] Regardless of who is right concerning this situation, there has been serious bitterness and a real danger of physical violence. I feel the declaring of martial law was a necessity under these circumstances." August 26th, 1931.

G. P. Birdwell: "I have lived in Overton 21 years, having been in the drug and garage business. I have been school trustee and I am now, and have been for the past six years, justice of the peace here. During this time, through the above activities, I have become well acquainted with most of the people in the territory of the oil field. For the past thirty days I have noticed marked unrest among the land owners and affairs were fast approaching a crisis at the time Martial Law was declared.

Many people, whether rightly or wrongly, felt they were being robber of the oil value of their property. Wells were being run wide open at many times the capacity allowed by proration and while prices were as low at times as 7¢ to 8¢ per barrel. They felt they were losing their oil forever for a mere pittance.

Further, they were uncertain as to whether they were going to be paid royalty on a basis of oil actually run or on basis allowed by proration order. This was furthered by fact that oil companies were slow in giving out division orders showing the amount of oil they were to pay royalty on. Also slowness of companies in paying royalty added [fol. 393] to this feeling of dissatisfaction.

Of course many of these landowners were uneducated and were of limited business experience and of no oil experience. Some did not even understand the interest they owned in the oil being produced. All of this made military law and the shutting down of the unlimited production of oil necessary." August 25th, 1931.

J. E. Wheelis: "• • • There has been lots of discontent among royalty owners around here who feel they are not being paid for their oil. I have heard talk that there might be violence or fires started. Of course I do not advocate anything like that. It is believed some of the other fires have been *been* set this way." August 24th, 1931.

F. A. Florence: "I am a married man and have resided in Rusk County and was born there. Our family has owned the property known as the A. J. Florence home place since 1870. • • • There is a general sentiment among the landowners that unless there is something done to stop the waste and getting a fair price for their oil that they will take the law in their own hands and do something to stop it." August 24th, 1931.

Chaplie Lloyd (colored): "There are four wells running on my property and one well drilling. All these belong to the same company. * * * The first one came in several months ago, before June, and the others have been brought in at different times since then. I haven't received [fol. 394] a cent of royalty yet. I think that the shutdown of the oil field has been a good thing. I have lived on this same place thirty years. I am eighty years old, born in Gregg County in slavery time and have lived here ever since." August 25th, 1931.

F. O. Wright: "* * * All the property owners in this section look with favor on the shutdown and were very much dissatisfied with existing conditions." August 25, 1931.

Ella Smith Hagler: " * * * I have not received any royalty money for either one of these wells. * * * I am a widow, 49 years old, and was born and raised in this county." August 26, 1931.

Susan Scott: "I have 43⅓ acres * * * There are two wells on my property. The first well came in about May 12th and the price of oil at that time was 67¢ per barrel. They started running oil right away and I do not know how much has been run. The second well came in twelve or fifteen days later. Since then I have received one check for $209.64. They based the price of 25¢ per barrel down to 10¢ per barrel. I am a widow and have lived in this place for fifteen years and in this county nearly all my life. I am 59 years old and have six grown children. My taxes are all paid and my title is clear." August 25th, 1931.

Rosea Snoddy (colored): "I am a son of Thad Snoddy. My father owners 62½ acres of land in the Taltrip pool. There are five wells on the property * * * One was brought in in March, one in April, one in May and one in [fol. 395] July. The only money my father has received from any of these wells was for some fuel oil sold. So far as I know all of these wells were flowing at the time wells were shut down. I think that the colored people in this section are glad to see the shutdown. My father lived all his life here and I have lived with him." August 25th, 1931.

R. A. Motley: "I am President of the First State Bank of Overton and have resided in Rusk County all my life. I have been in the drug business and farming, and organized the First State Bank some 16 years ago. I own approximately 1060 acres of land near Overton. * * * There is a general satisfaction among property owners at the field being shut down as they feel that they have received inadequate price. Particularly within the period immediately before the shutdown. I made this statement voluntarily." August 25th, 1931.

C. B. Johnson: "My mother owns about sixty acres * * * I am a farmer, manage my mother's property, am 41 years old and born and raised in Gregg County. * * * I think the sentiment of the people in this neighborhood has been one of disappointment and anger and most of the landowners, the best of my knowledge and belief, were in favor of a shut down and are pleased with both the shut down and the present conduct of troops enforcing it. * * *" August 25th, 1931.

Mrs. Delliah E. Johnson: "I have heard the above statement of my son Mr. C. B. Johnson read to me, and [fol. 396] the facts stated therein are true and correct to the best of my knowledge and belief." August 25th, 1931.

Gillie Patterson: "I manage the affairs of my mother, Mrs. Abbie Patterson, and my brother, Garrel Patterson. I reside with my mother on the Vargas Survey in Smith County. We have one well on our property, having leased 153 acres * * *. They drilled this well on May 28, this year. I received first division order August 7th and have not received any for our royalty or the balance of our lease money, a part only having been paid in cash. I think that the property owners of this vicinity have generally approved of the shutdown of the field. * * * I have lived here fifty-one years, having been born on this place." August 26th, 1931.

Many persons have made oral statements to the effect that the property owners would have taken charge of the field by force of arms if the Governor had not intervened. If and when the condition in the oil fields in August, 1931, is brought into question, literally hundreds of responsible

people will testify substantially as those who voluntarily made written statements.

What of the Danger of Violence Now?

The field was opened up under an allowable of 225 barrels per well per day, in accordance with the findings of fact of the Railroad Commission that more than 400,000 [fol. 397] barrels per day would bring about physical injury and waste to the oil and gas producing sand in the East Texas oil field. Here are quotations from telegrams, letters and resolutions forwarded to the Governor and to the Commanding General of the Military District. These communications are dated from October 19th to 30th, and in interest of saving space, dates and details are omitted:

J. F. Rowe, of Rowe & Bristow, a telegram: "In my opinion if the wells in the East Texas field are opened up it will cause bloodshed and destruction of property."

Tyler Chamber of Commerce adopted the following resolution: "Directors of Tyler Chamber of Commerce in session this afternoon unanimously went on record in approving your action in establishing Martial Law in the four counties in East Texas believing that that extremity was a necessity in order to preserve order, prevent disturbances and conserve our natural resources. Confidence and support in your administration was reaffirmed."

W. C. Windsor, of Tyler, Texas, a letter: "It is my firm belief that should the State troops be recalled permanently Federal troops would be required to replace them within ten days time."

Longview Chamber of Commerce adopted the following resolution:

To all to whom these presents shall come:

Whereas, the Governor of the State of Texas, under [fol. 398] his Proclamation No. 8447, under date of August 12th, 1931, declared Martial Law in the Counties of Upshur, Rusk, Gregg and Smith, and

Whereas, the city of Longview is in said district, and

Chamber of Commerce, and citizens of the County of Gregg, heartily endorse the action taken by the Governor because we believe that the time prior to the declaration of Martial Law there were threats of outbreak, acts of violence on the part of the indignant responsible citizens of this city and other parts of the County, against those who openly, flagrantly and rebelliously violate the laws of the State and disobey the constituted authorities of the State of Texas, and a state of insurrection, riot and breach of peace existed, and

Whereas, Brigadier General Jacob F. Wolters was sent by the Governor in command of this Martial Law area, and in our opinion has faithfully and impartially carried out the orders of the Governor to the interest of all concerned, and

Whereas, on the 13th day of October, 1931, certain operators within this Martial Law area saw fit to appear before Federal Court and ask for an injunction restraining the employees of the Railroad Commission and General Wolters from carrying out the Railroad Commission's orders, which injunction was granted by the Federal Court, permitting the opening of the wells of the parties seeking the injunction, and

Whereas, at the time the order was issued there was [fol. 399] a sense of feeling among producers of this area to the effect that if these wells were permitted to be opened, that their wells should likewise be opened, and were ready to open them at any time, and

Whereas, with this feeling existing among the operators, we believe the citizens, landowners, royalty owners and tax payers of this county became very apprehensive as to what would happen if such condition should exist, and were preparing themselves to protect their property in any manner they could, by force or violence in destruction of property and loss of human life, or in any other manner to protect and save their property.

Therefore be it resolved, that this organization with its standards of civic pride, strong support of public safety and welfare of its citizens, and a strong demand for obedience of all laws, do most heartily commend and pledge our support to the Governor of the State of Texas, for his action in placing Martial Law in this district, and to Briga-

dier General Jacob F. Wolters, his officers and men, for their faithful performance in carrying out the orders issued to them which in our opinion averted and prevented disturbance, riot, destruction of property and loss of human life and helped the people of this section to protect their property, and prevented the return of the conditions that existed before or prior to the placing of Martial Law in this district, and

[fol. 400] Be it further resolved, that copies of this resolution be forwarded to the Governor of the State of Texas, the Adjutant General of the State of Texas, Brigadier General Jacob F. Wolters, his officers and men, and to the press.

(Signed) Longview Chamber of Commerce, by G. A. McCreight, President.

Attested by M. D. Abernathy, Secretary.

B. F. Phillips, Mayor of Gladewater, telegram to Governor: "Our people are satisfied with Martial Law control Stop The field is running smooth Stop Labor is largely employed."

Following is a communication from Mayor and Commissioners of City of Gladewater: "We, the undersigned Mayor and City Commissioners of the City of Gladewater, Texas, wish to commend you on your recent action when certain East Texas oil operators secured an injunction against the Railroad Commission prohibiting them from exercising supervision over the oil wells owned by these operators. If these operators had been allowed to flow their wells wide open it would, in our opinion, cause a breakdown of our conservation laws and would have led to untold strife and violence and probably cost the lives of a number of citizens, as well as many thousands of dollars in property value.

While we are law abiding citizens and believe in upholding the rulings of all courts, we feel that in this instance the seriousness justified your actions and sincerely hope that the injunction will be set aside at the hearing to be [fol. 401] held in Beaumont within the next few days.

To the best of our information and knowledge the present plan of handling oil operation in East Texas is very

satisfactory. We have heard very few complaints and believe that the present rules and regulations should be kept in force."

East Texas Chamber of Commerce, Longview, Texas, wired the Governor: "Executive Committee here today resolved that in their opinion your action in establishing Martial Law to preserve order prevent disturbances and conserve natural resources was necessary and that removal of soldiers now would threaten the peace and dignity of the four counties so affected."

Following telegram from Citizens of Henderson: "Have just learned of you having been cited for contempt. Wish to assure you that the land and royalty owners of Rusk County oil fields are grateful to Governor Sterling and the Legislature and especially to you General Wolters for having saved our oil field from wanton waste and destruction. Should present orderly production of oil be annulled we believe that anarchy and chaos will prevail through this oil field instead of the present peaceful and highly satisfactory state of affairs." This telegram signed by Garland Farmer, Rade Kangerga, W. H. Bodie, J. T. Brown, J. J. Rayford, John R. Alford, E. B. Alford, J. E. Arnold, M. L. Marwil, A. S. Redwine, L. W. Turner, J. B. Alford, R. T. Forman, D. B. Reedy A. J. Deason, D. R. Harris, S. P. Ross.

[fol. 402] A. B. Capers, under date of October 20th, when he was Deputy Supervisor of the Railroad Commission, in charge of proration in the East Texas Oil field, sent the following letter:

"I have heard rumors the last few days that as a result of the Federal Injunction against the Railroad Commission and propration in East Texas, there is a likelihood of the Federal Courts enjoining you from enforcing proration in East Texas. If this should be done, which I certainly hope it will not, it will result in a number of things.

First. Ruination of the East Texas field and all the independent operators in the East Texas field.

Second. Demoralization of the oil industry, resulting in tremendous loss to working men who will be thrown out of

employment. And indirectly, it will also result in numerous bank failures with tremendous losses to the people in Texas and the United States.

Third. It will result, in my opinion, not only in loss of property, but in rioting and bloodshed, and will aid the I. W. W.'s or Reds to get in their pernicious work. I am basing my opinion upon talks I have had with practically all the operators and land owners in East Texas. These gentlemen are all agreed that the above things are not only possible but will inevitably happen in Martial Law should be lifted in East Texas and the field thrown wide open.

Numerous royalty owners have come into my office and [fol. 403] have stated that if the Court do not protect them from those operators who desire to steel their oil that they propose to take the law in their own hands and deal with it themselves, even though they have to use shotguns. In addition, any number of independent operators have told me that if their oil is drained from under them by operators who are able to build pipe lines and refineries that they will not only thrown their wells wide open on the ground but will, if necessary, resort to dynamite.

I don't want to be pessimistic but am simply telling you these facts in order that you may use them where they may do the most good. If necessary, I will be glad to go on the witness stand and swear to this. And if the men who made these statements are agreeable, will give their names. * * *

Mr. Capers was connected with the Proration Department of the Railroad Commission in East Texas field prior to Martial Law, and probably there is no man in Texas more familiar with the field and its situation, for he has followed it from the time that it become a field of major importance. He has probably talked to more individual land and royalty owners and operators, both large and small, than any other persons, and in my opinion is truly qualified to say what their feelings are in the matter.

Luther Swift, Deputy Supervisor, Oil & Gas Division, Railroad Commission, in letter stated: "* * * I feel [fol. 404] that if prompt action had not been taken, serious damage no doubt would have been caused to the life of the East Texas oil field."

County Judge of Gregg County, Hon. W. R. Hughes, endorsed by Commissioners and other prominent citizens, writes as follows: "I have been very much concerned of late as to the resulting effects of the injunction recently granted by Federal Judge Bruant of Tyler, nullifying the Railroad Commission's order as to the Brock Lee wells, opening up the same to full capacity.

As a land owner, royalty owner, citizen and public servant, I can not help but feel, and I believe that this action of the Federal Judge can have but one result, and that is if permitted to stand or if extended to other producing wells, that immediately it becomes effective we will have in this entire field the same conditions which obtained here prior to the declaration of Martial Law and the shutting in of the wells. At the time Martial Law was declared and the wells shut in, it was generally known that there was deep-seated feeling on the part of our people generally that their property was being taken from them in a manner that was little less than confiscation of their resources. Many of our citizens expressed themselves to me that they not only deplored the condition then existing and felt that they were being robbed of their inheritance, but that they were willing to act with others if necessary to putting a stop to it. On several occasions when our citizens talked with me along this line they expressed [fol. 405] themselves as willing to resort to the shotgun if necessary to stop this waste of their resources. I advised them, of course, not to do that, that the only way out of the difficulties was by the action of the Governor in shutting in the wells and by reducing production in these fields. The state of popular mind among a considerable number of our people was such that with the least agitation they would readily have attempted to shut down by force. The fact is that the action of the governor in declaring Martial Law came barely in time to save a revolution among our people. If that condition had continued for a week longer, I think we would have had open violence and perhaps loss of life on the part of the people to protect their property from useless, needless waste.

In the event the wells are opened and the same condition returns, as it undoubtedly will if the wells are opened, I feel we will have such a state of public mind in resistance

to the operation of these wells at full capacity that violence may be expected and that great damage to property and to life may result.

As a royalty owner and land owner and public official, I believe the only thing that can give the people assurance of reasonable protection and preservation of their property and a fair price for their oil is to maintain in effect our present system of control. I trust that in your efforts to serve and maintain peace and order you will do what-
[fol. 406] ever is possible to continue in effect proration as we have it at present. * * *

(Signed) W. R. Hughes, County Judge, Gregg County, Texas.

P. S.—We, the undersigned, heartily endorse the above statements of Judge Hughes.

(Signed) W. E. Jones, County Surveyor; E. C. McCarty, J. L. Scogin, Bery Eyrr, J. F. Stuckey, Lee Bradshaw, County Commissioner; B. C. Todd, County Commissioner; J. S. King, County Commissioner; W. R. Nicholson, J. C. Barton, Bell Smith, C. A. Loftis.

Hon. R. B. Walthal, former private Secretary to Governor Pat M. Neff, and former member of State Board of Control, now in the employ of the Railroad Commission, stationed at Longview, writes:

"The injunction issued by the Federal Court in Tyler against the Railroad Commission, the Attorney General and yourself, caused almost a sensation among those interested in the oil business in Longview. I mingled among the oil field workers, royalty owners, and etc., immediately following the injunction order, and was alarmed at their hostile attitude with reference to this matter. I heard many say that they would be glad to assist in dynamiting the wells affected, and most all of them I heard talking about the matter also wished to burn the little independent refinery at Overton.

Your action in shutting these wells following their opening, in my opinion, saved a most serious situation.
[fol. 407] I want to congratulate you on your judgment and courage."

W. P. Laughter, a Deputy Supervisor, stationed at Longview, writes:

"We were notified in this office by people here in Longview, and also in Tyler, that they were not going to permit those wells to run wide open, regardless of any Federal Court injunction. If the soldiers could not shut them in, they would take the law in their own hands, and dynamite the wells, and burn the refinery near Overton.

"In my opinion your prompt and timely action averted a most serious situation and I wish to heartily congratulate you on the manner in which you handled this situation."

W. N. Shelton, an employee of the Railroad Commission at Longview, writes:

"I wish to congratulate you on the manner in which you handled the situation pertaining to the injunction granted against the Railroad Commission, and others, on the 19th day of this month.

Being closely associated with the oil fraternity, both as producers and royalty holders, I can say that speculation was very high as to how you would overcome the obstacle that the injunction would have caused. I am sure that numbers of people requested that you sip this in the bud. [fol. 406] Feeling was very high among most all of the operators in Gregg County, and they decided to take this matter in their own hands. I believe that you exercised a much "reign of terror" in handling the situation as you did, in preference to waiting for a decision in the courts.

The people are very grateful to you for the stand that you have taken, and they are of a high-class and high-type and many of them have already expressed their desire to stay with you in this matter to the last ditch."

Let the fact be remembered that these gentlemen, who are connected with the Railroad Commission, mingle with the oil operators generally throughout the field, and know their sentiments.

W. M. Phillips, a letter: " * * * also want to say to you that should those wells have been allowed to run wide open that would have broken the Conservation Laws of this State, and led to depletion of the fields, and would have stopped all drilling operations which would have made the

employment situation a very delicate thing to handle in this field. * * * *."

J. W. Pugh.—" * * * If these wells had been permitted to be produced as it was wished, that the price of oil would have decreased, the employment situation would have become acute, and it would have led to strife and violence. * * * and come in contact with a great deal of the public, as well as I am uncertain, the laborers, royalty holders, and land holders are all pleased with the action you took to-day [Jul. 6th] over what they think would have been very the extreme."

Following communication from citizens of Longview:

"We, the undersigned land and royalty owners in the East Texas field, want you to know we very deeply and sincerely appreciate the stand you have taken to protect our interest. We feel sure without all the price of oil would today be below ten cents per barrel, and there is no telling what would happen in such an event."

(Signed) W. T. Dawson, O. A. Castleberry, Chas. Clemens, W. L. Eastland, B. C. Johnson, J. T. Davis, E. L. Holt, L. Johnson, Frank Clemens, B. C. Bagwell, Geo. Wyatt, J. C. Pearson, L. V. Skipper, C. J. Dobbins, B. F. Doty, E. L. Sherrill.

The Texas Rangers, who have from time to time been on duty in this district, and the officers and soldiers, who have now been since August 17th, in constant contact with land owners, royalty owners, operators and other citizens, know and understand the situation. In fact, in this district, the situation is by all classes of people generally accepted to be the following: If the oil wells are permitted to be opened without control, the citizenship will be force of some shot them down. That is the common talk. It is an actual condition and not a theory. It has been suggested that if the wells are opened as the result of judicial proceedings, then it will be the duty of the Governor through the National Guard to prevent the people concerned from attempting to shot down the wells and committing other acts of violence. That is clearly true. But let no one here this will work out in practice.

[fol. 410] Here is an area 49 miles long, three to nine miles wide, in which there is located on the day this is written over 3,000 producing wells. As the weeks pass they will increase. Any experienced Military Authority who will make a survey of the situation will decide that it will require five soldiers to guard a well, separator and battery of storage tanks. This is a minimum. That would mean twelve to fifteen thousand soldiers. It would be folly to have men on such duty for more than eight hours. Therefore, it would require thirty-six to forty-five thousand men alone to guard the wells. An adequate force in the subsistence department, transportation department, the medical department, the communication section, etc., to take care of such a force. But that would not be all. The pipe lines and tank farms would have to be considered, and let it be remembered that a pipe line dynamited outside of the Military district is as effective in stopping the flow of oil as if it was dynamited within the District. In addition, there would have to be guards for the small refineries dotting the area and those wells now drilling. Also it would be necessary, once violence got under way, to guard all property in the area, even though not connected with the producing of oil. There is not a state in the Union that could muster a military force to secure adequate protection once violence started in their field. The results would be horrible to contemplate. It must, of course, be remembered that if and when so called responsible citizens start a row of this kind, the entire element, the Reds and the reckless [fol. 411] and irresponsible elements that live in ordinary communities, under ordinary conditions, welcome the opportunity to take a hand in it, and there are always quite a number of them in an oil field area such as this.

The facts herein set out are presented for the consideration of the people of Texas because it is generally judged and accepted to be true that the only reason the Governor declared Martial Law and keeps the troops in East Texas is to boost the price of oil. The fact is the Governor declared Martial Law because a state of insurrection did exist in that many oil operators were flagrantly violating the constitution and statutory provisions against the waste of oil and gas, and as a result of which, other people who were interested in these natural resources were so enraged

and wrought up that there was much danger of tumult and riot.

The further facts *is* that these same people, including now many operators, saw as a result of the excessive production salt water appear in portions of this field away from the western edge where salt water already exists. They saw after the wells were shut down for a period of time, and then were reopened and required to produce under a ratable allowance, this water disappeared and in truth and in fact receded to a line further west than where it had been before the shut down. Even land owners, not at all versed in geology or in oil sands and structures, now readily see that the orderly ratable taking will properly protect their oil sands for many years while the reckless [fol. 412] and excessive taking will quickly destroy it. Therefore, they insist upon the protection of their property rights. If the law does not give it to them, they propose to execute the law themselves and protect themselves. Inevitably this would lead to violence, to bloodshed, to fires. It is all right to scoff and say citizens should not take that attitude. Let any man place himself in the shoes, if he can, of these people. What would any respectable citizen do to protect himself, his family and his property from parties bent on detroying them, and he saw that the civil authorities could not protect him? He would take steps to protect himself, by whatever means he could find. If necessary, and in all probability, he would use violent and quick methods. That is exactly what these good people were preparing to do, to defend their property—their natural resources—from the invasion of those who would recklessly destroy it. It was in order to prevent bloodshed, violence, riot and disturbances of the peace that the Governor sent the troops into East Texas to put down the insurrection of those oil operators who were violating the conservation laws of this State, and causing or about to cause the uprising of the people of this section against them.

The Witness: Counsel had handed me a letter written on stationery that has at the top "Hotel Longview," dated October 17, 1931, and states that this is a personal and con- [fol. 413] fidential communication in the nature of information in regard to possible criminal activities, and for that reason is not introducing the letter or disclosing the name

of the gentlemen who wrote it. I received that letter and the writer asked that it be held confidential.

(The defendants, R. S. Sterling, Jacob F. Wolters and W. W. Sterling, then introduced in evidence the letter identified by the witness, with the exception of the signature thereto, which is as follows:)

"Honorable Ross S. Sterling, Austin, Texas.

DEAR GOVERNOR: Even though it seem impossible for the outside world to understand the situation in East Texas, General Wolters has a true knowledge—he understands the pulse of East Texas, as the attached statement is as true as Gospel. I am making this statement to you in confidence. Since my return to Tyler Thursday last, I have been invited to join a very determined group who are, I am sure, determined to hold production around the present level even though misguided public opinion or U. S. courts force you to lift martial law. Upon second thought I deem it best to withhold my name, but since I am for law and order and will not be a party to blowing tanks or lines—I feel that you should know the true facts. General Wolters is right. I will watch development, if you need evidence, I will come to Austin, go to Washington or do anything I can to help prevent chaos.

Yours respectfully, —— ——"

And beneath the signature is:

[fol. 414] "P. S.—Since I have given you my name, please regard this letter for your personal information."

(Defendants, R. S. Sterling, Jacob F. Wolters and W. W. Sterling, then introduced in evidence a newspaper clipping attached to the letter just introduced, which newspaper clipping is as follows:)

Wolters Predicts Violence if Wells Again Opened Wide

Austin, Oct. 16.—Gen. Jacob F. Wolters, commander of the State military forces in the East Texas oil field, predicted here Friday that armed violence doubtless would result in that sector should the wells again be permitted to be "opened wide."

Should the wells be permitted to flow unrestrictedly, as they did prior to Aug. 17 when the Governor closed them under martial law, there would be a movement to close them by "force or arms," General Wolters stated. "The talk is more or less openly made that if the wells can not be held down by the State of Texas, that they will be shut in by citizens," he said.

"If this can not be done by reason of guards around them the pipe lines and storage tanks will be blown up so that there will be no place to put the oil and therefore by that means force a shut down.

[fol. 415] "It is evident that the people of Texas have never fully understood the real situation in the East Texas oil field," he said. The military forces did not arrive one day too soon to prevent outraged land and royalty owners from taking possession of the field and by force of arms shutting down the wells that were running wide open. The operation of the oil field in an orderly manner and under proration since that time has convinced not only the royalty and land owners, but 95% of the independent operators, that to again permit the wells to run wide open would result in the destruction of their oil resources and irreparably injure and damage them, as well as impose a very great loss to the State of Texas and its revenues."

The Witness: Counsel has handed me a printed paper headed "A Message from the Railroad Commission of Texas to Governor R. S. Sterling." I received that message from the Railroad Commission.

(The defendants, R. S. Sterling, Jacob F. Wolters and W. W. Sterling, introduced in evidence the message from the Railroad Commission to Governor R. S. Sterling, identified by the witness, which is a- follows:)

A Message from the Railroad Commission of Texas to Governor R. S. Sterling Suggesting Immediate Action Relative to Conservation of Oil and Gas

[fol. 416] May 19, 1931.

Hon. Ross S. Sterling, Executive Office, Capitol, Austin, Texas.

Dear Sir: The Railroad Commission after extended hearings has from time to time issued orders designed to prevent

the waste of oil and gas in Texas; they have been generally observed and have resulted in preventing great waste. Recently many suits have been filed contesting the orders especially as to the East Texas fields. During the pendency of these suits no penalties can be collected for violations of such orders and the operators are producing as they please. It will take months before the Supreme Court can decide the legal questions involved.

The testimony at the various public hearings showed beyond question that unequal withdrawals and unrestricted flow, especially in flush areas, cause a great loss of oil and gas and the recovery of oil will be about one-half what it could be under proper operating conditions. Such waste [fol. 417] should be prevented, for the time will soon come when our oil and gas reserves will be greatly depleted or exhausted. The price will be prohibitive and if no cheap substitute is available, the calamity will be too serious to contemplate.

Under present laws and conditions the Commission can not promptly enforce its orders. It appears that the laws could well be strengthened. We are also handicapped by lack of funds. The pipe line law was enacted two years ago, but without any appropriation giving us power to enforce it. A petroleum engineer is needed and funds should be provided so that the State may pay the impires and other employees needed in the fields. At present such funds are raised by voluntary subscriptions paid by the operators in the field.

The Commission hesitates to make specific recommendations as to what legislation is needed, but it is obvious that it can not properly or promptly enforce its orders under present laws and without funds available and consequently the waste of oil and gas in this state is enormous.

Believing a crisis has arisen in the field of oil production and in the matter of conservation of both oil and gas, we favor legislative enactment that will relieve the situation and allay the dangers which daily grow more imminent. We feel the following suggestions are in line with our position in the matter:

(1) Texas needs some law by which the orders of the [fol. 418] Commission can be enforced while they are being attacked in the courts.

(2) Provisions for speeding up court machinery so that suits attacking the orders of the Commission may be speedily disposed of in the interest of the contestants, the Commission and all others affected by the order involved.

(3) Provisions clarifying the present statutes as they relate to the power of the Commission to prevent the wasteful dissipation of the gas and gas energy of an oil pool.

(Signed) C. V. Terrell, Chairman. Lon A. Smith, Commissioner. R. D. Parker, Chief Supervisor of Oil and Gas.

The Witness: As Governor of Texas and Commander in Chief of the military forces of this State, I have believed it necessary in enforcing martial law, suppressing the existing insurrection, and preventing further insurrection, riot, breach of the peace and general disorder, to curb production of oil in the military district of Upshur, Gregg, Rusk and Smith Counties, as I have done. I had no other purpose in declaring martial law over there, and in curbing production, than maintaining the law and preserving peace and order in that section and, I think I may say, conser- [fol. 419] vation of the natural resources of the state, which latter purpose was incidental to my efforts to maintaining law and order.

As a part of the conservation measures that the several oil producing States were trying to work out, one of the things we want to prevent was importation of large amounts of oil from foreign countries. During this present year, especially in the early part of the year or the spring, it was my understanding that the National Administration was very active in trying to work out some such arrangement through the Secretary of Commerce of the United States; it was my understanding that they were trying to lessen or cause to be lessened the amount of oil being imported into the United States. This committee that went to the Texarkana meeting appointed a committee to go to Washington to see Mr. Lamont. As a result of the various activities of those committees, in which I had some participation, it did result in a large decrease in the importation of foreign oil. In fact, I think I have a reply to a wire that was sent to Mr. Teagle on acount of being connected with the Standard Oil Company of New Jersey; that was an

importing company and Mr. Teagle was not in New York, but one of the officials of the company did reply, and he gave figures which were contrary to the figures in rumors circulated about the increase in the importation of oil. As a matter of fact, it had decreased monthly as they had gone along, and his reply, I think, that was given out to the press, the substance was—in other words, we had reports by differ-
[fol. 420] ent people that they were increasing imports into this country instead of decreasing them, and this country had more oil than it could handle.

Counsel suggests that the distinction attempted to be made in this case is that the Secretary of Commerce was seeking to obtain an agreement among the importers of crude petroleum that they would limit their imports in order that the market would not be flooded in the United States. I did not get it that they were seeking an agreement; I got it that they were trying to prohibit the imports of oil into the United States. Of course, the question of agreement would enter into it, but the purpose of that tariff is to limit the amount of imports. It perhaps would be correct to say that it was an agreement that they were seeking to get out of the various importing companies. As to how the tariff would violate the anti-trust laws, I could not figure out.

Hon. Lon A. Smith, a member of the Railroad Commission of Texas, then testified on behalf of the defendants R. S. Sterling, Jacob F. Wolters, and W. W. Sterling, by deposition, as follows:

Mr. Moody: This has to do with the question that Judge Bryant just asked a minute ago. The witness is speaking of the meeting in the Governor's office following the conference of this committee at Oklahoma City that was spoken of by Mr. Bailey in portions of the deposition that he read from.

[fol. 421] The Witness: It was also a part of the idea that the purpose was to keep the production within the 400,000 barrel maximum, believing that that would be the amount the field could produce properly without any danger to the field. Generally speaking, the subsequent orders have been made with the idea in part at least of holding the produc-

tion within the 400,000 barrels. I would be glad to state here, though you have not asked the question, that when this new order, the second order, was being discussed, I favored that 200 barrel allowable, and the question of 175 barrels seemed to be in the minds of others, and I claim that I am responsible for its being 185, because I would not sign an order that made the amount lower than 185 barrels per well; I wanted 200, a reduction of 25 barrels to the well. The Governor wanted 175 barrels. Well, the Governor agreed to a program like that at that time and the chairman of the commission as to that matter felt that 175 barrels would be proper.

Governor Sterling favored the original proposition originally submitted by the representatives of Kansas and Oklahoma. I would not say that he espoused the proposition on the ground of affecting the price. I do not recall what was the attitude of the Governor and his representative, Mr. Thomas, because I was not present for this final caucus that led up to the final agreement as to what the report of the meeting should contain.

Mr. Moody: If I may say here, that the Court may understand the purpose of this testimony, we except to show by [fol. 422] further witnesses that the impression prevailed in East Texas that an allowable in excess of 400,000 barrels would result in destruction of the field, and that that would promote insurrection and disturbances of that kind, and the testimony here is offered now as to what bearing on that question and what produced that state of mind in the East Texas field that caused the Governor to act as he did with reference to modification of the original order.

Judge Grubb: You mean the physical destruction?

Mr. Moody: Yes, sir, I mean it would bring about a physical destruction of the field through encroachment of water and the reduction of the reservoir pressure in the oil field. That would induce in the minds of dissatisfied people a desire to control the thing by force, rather than by law, and made it necessary for the Governor to modify his order.

Charles Roeser, thereupon testified in behalf of the defendants R. S. Sterling, Jacob F. Wolters and W. W. Sterling, as follows:

As to the total production for the State of Texas on the basis of 225 barrels per well in East Texas being in excess of

the market demand, I will say that the market demand had been able to absorb around 300,000,000 barrels of Texas oil for the past three or four years and that was about 900,000 barrels per day. We men in the producing business realized it would be impossible for the market to absorb over 900,000 [fol. 423] barrels to the State. I don't recall that I stated that fact to the Governor but I did say to the Governor that at the August 25th hearing before the Railroad Commission, a preponderance of evidence had been offered by competent engineers, men of unquestioned ability, that physical or underground waste would exist at any figure in East Texas which was in excess of 275,000 barrels per day.

Mr. Moody: I think it is otherwise shown in the deposition that Mr. Roeser is the owner of oil producing properties in Texas and if it is not shown, I think it will be admitted, will it not, Mr. Bailey?

Mr. Bailey: Yes.

Hon. C. V. Terrell, Chairman of the Railroad Commission of Texas, then testified by deposition on behalf of the defendants, R. S. Sterling, Jacob F. Wolters and W . W. Sterling, as follows:

I did not know that by cutting the allowable down from two hundred and twenty-five to a hundred and eighty-five barrels I might hold the production of Texas to 900,000 barrels in accordance with the agreement; I did not figure that. The production was decreased from 185 barrels to 165 barrels for the purpose of preventing waste. Of course, I knew that the day before we issued that order the field was producing over 400,000 barrels. I knew that at that time, but I did not necessarily reduce it because of that reason.

When we fixed the allowable for the East Texas field, we did not fix 400,000 barrels. The order was amended on [fol. 424] September 18th reducing it from 225 to 185 barrels per well because we thought the field was producing more oil than it ought to, and producing waste.

Referring to the general hearing or the East Texas hearing which was held beginning August 25th, the testimony from the witnesses on the stand, according to my recollection, was that an amount of oil running from 300,000 barrels

to probably 400,000 barrels could be produced from the East Texas field without permitting physical waste. Most of the witnesses testified that they thought that in order to prevent waste about 350,000 barrels would be the proper amount or a little less. I think some witnesses said between 325,000 and 350,000 barrels would be the amount to be produced from the field to prevent waste. That is, daily production from the entire East Texas field. That testimony came from various geologists, petroleum engineers and practical operators. Now, I believe I will qualify that a little. One petroleum engineer testified that they could produce more than 400,000 barrels; I don't remember how much more, but considerably more. He took the position that there would be no waste by turning the wells loose. I think that was Ben Belt, one of the petroleum engineers. But the large preponderance of the testimony ran along from 325,000, I will say, to 400,000 barrels, is my recollection. Since that hearing we have had no further testimony or evidence contrary to those statements that I have just [fol. 425] testified about other than this gas-oil ratio business that I have just told you about; we have had nothing as to the production of oil they recommended to be produced.

I don't know just the figure that we limited the production of the East Texas field to after the August hearing; the preponderance of the testimony ran from 325,000 to 400,000 barrels. The testimony of one witness, I remember distinctly now, took the position that to produce any amount would not produce waste. The Commission determined to adopt the theory of the evidence and allow production of approximately 375,000 barrels; we wanted to hold our order down to the testimony, and the preponderance of the testimony showed that. As to whether the Commission then did determine to limit the production of the field to 375,000 barrels according to the testimony, I will say that our effort was to try to confine our order to the testimony, and there were three Commissioners, and each one of us had a different view of it, and we finally decided that 225 barrels per well was the proper amount. It seems to me that there were about 1800 wells. I think 375,000 barrels is about correct. I can figure it in a minute. I don't believe there were quite that many at that time. According to my recollection that

would make 400,000 barrels. I know it figured in the neighborhood of 375,000 barrels. As to whether we determined to limit the field to approximately 375,000 barrels, I will say that it ran over 375,000 barrels. As to whether that made the State's approximate allowance 900,000 barrels, I will [fol. 426] say that it was over that and I am sure it is over that now.

Mr. Moody: And we offer other testimony here where it was something in excess of two million barrels.

[fol. 427] Then from Mr. R. D. Parker's testimony we offer the questions and answers, identifying him as an officer and employee of the Railroad Commission, on page 79, and that he is Chief Oil and Gas Supervisor of the Railroad Commission, that he was present at the hearing preceding the order of September 22. Then from page 113 of his testimony——

The Presiding Judge: What is the relevancy of that testimony, Mr. Moody?

Mr. Moody: The purpose of the testimony, your Honor, is this: The Court has asked why these orders were changed from time to time.

The Presiding Judge: Well, I know, but with reference to the Governor; the Governor doesn't claim the Commission has been doing any thinking for him, does he?

Mr. Moody: No, sir, he does not.

The Presiding Judge: He is acting arbitrarily or because he thinks that will help it out?

Mr. Moody: Not entirely that; my conception is that the testimony will show and the purpose of this evidence is to show, and other evidence that we will introduce, that there was a widespread feeling among operators and royalty owners in East Texas that the production of oil from this field in excess of a given amount caused an injury to the field itself and a physical waste of the field; that that character of belief had been created by a wide dissemination through that field to the people interested in it of this in-

[fol. 428] formation that these witnesses testified to as having been heard by the Railroad Commission at its hearing preceding this order of September 2; that there was created in the minds of the people in the East Texas oil field a belief that if it was allowed to produce in excess of that amount that it would injure their property and they

would sustain irreparable losses and they determined if this production was not held within a reasonable limit that they would take the matter in their own hands and proceed by force and violence to control the production of oil; that those facts were brought home to the Governor's attention, that the Governor, in an attempt to prevent that and maintain the supremacy of the law over lawlessness, declared martial law, that he has undertaken to not only suppress the threatened, but prevent any imminent insurrection and restore the thing into the hands of the other civil officers of the Government; he has sought to maintain that allowable or that production at a figure, not that will effect the price of oil or not that will conserve against physical waste, but that will prevent an insurrection because those people think their property is wasted, and that the Court may realize, I anticipate that we will be able to offer testimony here, at least we understand that it is available to us, that men have stated they were ready with their pistols to control the valves of their wells and their neighbors' wells, if they drained their wells.

[fol. 429] The Presiding Judge: In other words, the Governor has yielded to lawlessness because he is endeavoring to combat it?

Mr. Moody: No, not yielded to lawlessness, but that the Governor has controlled lawlessness by entering proper orders to preserve the peace over there.

The Presiding Judge: That is what we want to get.

Mr. Moody: Yes, sir.

The Presiding Judge: Of course, I don't suppose that you admit that the Governor and the Militia have adopted the pusilanimous course of yielding up there to stop lawlessness; you don't think the Militia are afraid of those people up there?

Mr. Moody: No, sir, I don't say that at all.

The Presiding Judge: You don't think that the Governor has yielded to that demand in order to placate those men making that demand? Is that it?

Mr. Moody: No, sir, that is not it exactly; I can illustrate it better by another illustration of martial law in this State. For instance, at Galveston over here certain people demanded the right to go around the wharves at night, which ordinarily would be a legal right that people would have; other people didn't want them around there. The com-

manding officer entered an order and posted a guard around there to prevent other people getting around there.
[fol. 420] The Presiding Judge: Did that take any man's property by preventing them from going around?

Mr. Moody: It restrained them of their liberty and the 14th Amendment speaks of liberty as well as property.

The Presiding Judge: It didn't take any property. If you had made an order that the strikers down there were causing a lot of trouble so you had better pay them just what they asked, that would be a good analogy.

Mr. Moody: I will give you another analogy in the declaration of martial law at Corpus Christi. The North Beach was swept practically clean by a tidal wave; there was a lot of property out there that belonged to someone. The commanding officer prevented anyone from going on North Beach except the National Guard and the commanding officer took charge of that property and administered it through this Court.

The Presiding Judge: I understand that; are you trying to take the position that the Commission has passed on these allowables that the Governor has now put in and has approved them as allowables which comply with the law against waste?

Mr. Moody: No, sir.

The Presiding Judge: Well, is this proof about the Commission just kind of preliminary to show that the things those orders do will apply—that is what I can't see; if the Commission has passed out of the case, what have their [fol. 421] orders got to do with it?

Mr. Moody: Their orders have nothing to do with it except this, your Honor, that the Governor had before him facts and testimony with reference to the amount of oil that could be produced without creating physical waste, that he understood the evidence and had that evidence before him and that a vast number of other people had the same evidence before them and had the same facts before them; that in East Texas there was a belief by many people that that was the amount of oil that could be produced without physical waste.

The Presiding Judge: But it is not claimed by you that you are now making proof that in accordance with the statute of Texas which delegated this matter to the Commission, the Commission has passed upon the orders which are now under attack?

Mr. Bondy:- Yes, sir.

The Presiding Judge:- All right.

Mr. Bondy:- Yes, sir, not at all and to complete my answer and to make myself clear to the Court, that the Governor has undertaken to do that which is lawful and at the same time he has undertaken--in making those orders he has done that which is lawful, for there is a reason back of that, but that the purpose of it was, not to control the production at all except as the production of oil affected the conservation. If your Honor will permit me to make a homely illustration, and I think sometimes they illustrate the law admirably, if the patient has chills and fever a doctor doesn't wrap him in blankets and put an ice pack on him when he has malaria, but he goes about it in an entirely opposite manner. The Governor could go down the field with open and he was armed to with armed rifles and bayonets to preserve the peace, but he concluded he could effect the same object of preserving the peace and preventing riot and destruction of property and the possible destruction of life by doing that which was lawful and practical in reaching the very seat of the trouble, which was the question of the production of oil.

The Presiding Judge:- If a man put a gun to the Governor's head and said, "If you don't do what I say, I will blow your brains out," and the Governor says, "I will do what you say."

Mr. Bondy:- Yes, sir, I was assuming that the man might put the gun to his head and advise he did something but he ought not to do, if it was what he ought to do, if it was a right and proper thing, he would be it, of course, and would have to do the right thing under those circumstances.

Judge Crabb:- He would have not to do it, but?

Mr. Bondy:- Yes, sir, he would have not to do it, but, and perhaps that latter term would overcome the former. There is one other question that has to do with the same thing.--

Judge Brown:- Let me ask you just this one question there.

Mr. Bondy:- Yes, sir.

[fol 402] Judge Brown:- Do I recall the testimony, the original date of the proclamation of martial law was on August 10th last year or the past year?

Mr. Bondy:- I believe that is about correct, your Honor.

Judge Brown:- Then, the Legislature adjourned with the bill, anyway, that was passed as a law, the bill that I bring

considered here was passed as a law on August 12th, wasn't it?

Mr. Moody: Yes, sir.

Judge Bryant: Now, the Governor had this information prior to the time of the passage of that bill and had transmitted all of that intelligence to the Legislature in requesting more comprehensive or more specific legislation than the Legislature actually passed in relation to this oil business, did he not?

Mr. Moody: My recollection is that the Governor, prior to the time of the declaration of martial law, had addressed a message, I read it at the time, but I speak only from memory, it may be inaccurate; my memory is that he addressed a message to the Legislature advising them that he thought that the present laws of the State were inadequate to protect the natural resources of the State; and that the Railroad Commission was overburdened; that there should be another Commission appointed, or, rather, an appointive Commission created for the purpose of controlling——

[fol. 434] Judge Bryant: The Conservation powers were the dominant thought of that?

Mr. Moody: Yes, sir, the conservation powers were the dominant thought in that message, or in one of the messages, and I am certain that the Governor stated that he would not give his endorsement, and I think further said that he would not give his approval to any measure that undertook to make market demand or economic considerations, that is, the price of oil, the determining question as to the amount of oil which might be produced. And if you Honor would give me one moment further on that, the Governor of Texas has several interests in the oil business, officially, I mean; he has, first, the interest of a citizen and as an officer that the natural resources of the State shall be conserved; he has, second, the interest that such oil as is sold shall sell at a favorable price, because this State produces more oil than it consumes and its position with reference to oil is like its position with reference to cotton; the State is an exporter of oil and produces more than it consumes; it brings wealth to the State; he has the third position that he is confronted with the serious necessity of balancing a budget up there to meet the State's demand and a large part, or a considerable part of the State's revenue is based upon the income which the State receives, and it is graduated upon the value of oil. He has another consideration, and that is,

[fol. 435] that the University of Texas, and the Public School funds, hold valuable interests in oil land and their revenue is affected by the royalties received from these lands. My understanding was that in calling the Legislature and in participating—this, of course, is not evidence, but I am undertaking to answer the Court's question: In calling the legislative session and calling the various conferences in which he participated my understanding was that the Governor was undertaking to discharge those public duties and protect those public interests which he had officially as Governor to do, but that in the declaration of martial law, his act there was based upon evidence brought before him of threats of physical violence as to what would be done unless that field was taken in hand over there.

The Witness (Mr. R. D. Parker): There were other reasons why the Commission felt the limit on that field should be fixed at approximate 400,000 barrels to prevent water encroachment. There were two main factors in there, to prevent water encroachment, and to prevent unnecessary waste of gas and dissipation of gas energy. I think that 400,000 barrel limit as testified to, contemplated any reasonable development of the field and holding the amount down to 400,000 barrels, even after they were more wells.

Mr. Moody: And in connection with that and supplementing my answer to your Honor's question I desire to say——

[fol. 436] Judge Bryant: Now, Governor, the only thing that I sought to bring out by that question—we will hear from you fully on your argument——

Mr. Moody: Yes, sir.

Judge Bryant: —was the fact of whether the Legislature didn't have this information which was made the basis of the exercise of this power, in mind at the time they gave the Railroad Commission the power which they did give them.

Mr. Moody: Oh, I think they did, yes, sir, they had in mind that the Railroad Commission would exercise the power, but at the same time the Railroad Commission had ceased to function and the Governor had taken it over.

Judge Bryant: All right, that is all developed fully.

Mr. Moody: Yes, sir.

[fol. 437] Jacob F. Wolters, one of the defendants herein, was thereupon called as a witness on behalf of defendants

R. S. Sterling, Jacon F. Wolters and W. W. Sterling, and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Moody:

My name is Jacob F. Wolters; I am a Brigadier General in the Texas National Guard now detailed to duty in what we call the military district of Upshur, Gregg, Rusk and Smith Counties.

By orders of the Governor as Commander in Chief of the Texas National Guard, I was placed in charge of that field as the officer commanding the military forces there to enforce the orders of the Governor of Texas, and I am still so occupying that position.

The property of the plaintiffs in this case is located in the military district. The military district consists of the counties of Upshur, Gregg, Rusk and Smith. The East Texas Oil Field extends from about eight miles north of the south line of Upshur County entirely through the County of Gregg and Rusk County, and into the southern extremities of Smith County.

The Governor at eleven o'clock Saturday, August 15th, called me over the telephone and ordered me to mobilize my brigade, the 56th Cavalry Brigade, together with such units from the Medical Department of the 36th Division and their [fol. 438] trains, in plain language "truck drivers," as I might need. Those orders were promptly complied with and the units mobilized in their respective armories that afternoon, and we moved into the area the night, Sunday-Monday, August 16-17, reaching the area probably a little after daylight of August 17th.

Prior to the time I received the order from Governor Sterling to go into this field up there and placing it under martial law and placing me in charge, I had not at that time had any conference with the Governor regarding his plans or the possibility of declaring martial law in that particular area. However, some two weeks prior to that time there was trouble talked about and he merely stated that he might have to send the Cavalry into that district. He said the reason that he might possibly have to send the Cavalry into that district at that time was that he was getting complaints of trouble between land owners and

operators and those operators who were violating the conservation laws.

I think if permitted I can give a brief picture of the situation that will probably give you a better understanding. During the hearings before the Railroad Commission and the Legislature, eminent geologists differed in opinion as to whether the East Texas field was one pool in its entirety from north to south or whether it was a series of pools. I may add that I was present and heard, on two occasions, their testimony, once before the Railroad Commission, and [fol. 439] the other time before the Senate of Texas. I was representing the Texas Company at those meetings. I would say now from memory that the geologists, both in eminence and number, divided about equally as to whether it was a common pool and as to the estimate of the allowable, as to the effect of certain production, and so forth. When we reached the oil field on the morning of August 17th, we had an order from the Governor to shut every well down. When we got there there were 1623 wells; the wells were flowing and my investigation disclosed that at least the last three days prior to our arrival produced approximately 1,400,000 barrels. We shut them down. They remained shut down until September 5th, from August 17th. A few days after the entire field was shut down wells in the south end that had never flowed, that had been pumpers and some of them never even standardized, that is, never been put on a pump, began to make gas and flow oil. It was accepted, so far as I was concerned, and everybody else that I have heard discuss the matter, that that settled the matter as to whether it was one pool or not, it being agreed it was one pool. When the wells were reopened it developed that there had been water accumulated in some of the wells even in the central portion of the field. If your Honors please, the western portion of the shore line, 47 miles long, is salt water in the western edge; the eastern edge is chalk bluff; it is said by scientists that it is a short line. The salt water is naturally on the western edge and wells that have [fol. 440] been drilled too far west get into salt water wholly or in pa-t. But the shut down developed that there had been salt water accumulated in wells almost in the center of the field. The production was opened with 225 barrels allowable. The salt water in the central portion of the field flowed off and ceased. Since that time salt water,

wherever it came from according to our investigation of our experts is still over yonder on the western edge of that short line.

Mr. Bailey: I have been waiting for just exactly that statement, "according to our experts." Now, let's have the experts; we object that the witness is not qualified.

The Presiding Judge: The objection is sustained; I just supposed he was making a summary of why they thought there was an insurrection out there.

The Witness: I am going to that in a moment.

The Presiding Judge: Just a moment, but if he is undertaking to testify to scientific and physical facts upon what some scientists told him, the objection is good.

Mr. Bailey: We move to strike it out.

The Presiding Judge: Strike it out.

The Witness: All right. If your Honor please, the general opinion—I want to get at what affects the mind of the people up there.

The Presiding Judge: If you are just stating it this way, that these statements were out.

[fol. 441] The Witness: Yes, sir, I will state it that way, although I have my own opinion.

The Presiding Judge: All right.

The Witness: The general opinion and information is as I have stated and from that the land owners and the operators, whether they be large or small, have reached the conclusion that any excessive production in that field or the production of more oil by one well in a substantial amount than in another well adjacent to it will serious physically damage the field. Now, that is the opinion, well grounded in the minds of the people throughout East Texas and in the oil field, just as thoroughly as anything can be.

The Presiding Judge: I thought you were just stating that that was talked about, not that you are undertaking to appraise the value of that opinion, because, of course, your statement that that was correct or not correct was objected to, but the fact that people were talking that way and feeling that way I think is all right.

The Witness: Well, all right, that is what I want to bring home in the picture to the Court.

The Presiding Judge: All right.

The Witness: If your Honor please, pardon me, it is a little difficult for a man who has done nothing in his life

but practice law and perhaps once in a while administer martial law, to fail to become the advocate. I will try to remain the witness. Now, that is the mental attitude of [fol. 442] those people. The oil brought a price of 10 and 12 cents, from which there was deducted a gathering charge before the purchaser took the oil of from 3 to 5 cents. The farmer receiving a one-eighth royalty as a result was getting 1/40th cent per barrel of oil produced on his farm. Right or wrong, he was not getting any royalty at that time and he was in a state of mental insurrection and ready to rise physically when we got there.

The Presiding Judge: Was he different from the seven or eight million of unemployed in this country who are getting nothing?

The Witness: I think he was different, if your Honor please; those who talked to me have said, "Here is my heritage; I have got this little family farm worth probably seven or eight hundred dollars from my father and mother; for three or four years we have made no crops in East Texas; along came the oil field and they tell us it is the greatest in the world and we see these people robbing us of that which is ours," and they would always wind up and say, "We aren't going to stand for it any longer." That is their attitude and that was their attitude when we came.

The Presiding Judge: Their attitude was, law or no law, they weren't going to let the law take its course, that is the way you got it?

The Witness: That is the way they looked at it, law or [fol. 443] no law, they were going to take care of their own property; in other words, their position, if our Honor please, is not—they are not a very highly educated people, they are, however, the descendants of those who came from the older Southern and the Atlantic states in the early days of Texas.

The Presiding Judge: I don't think that makes any difference; nobody is trying the people; I am just trying to find out what you found out; you found that the law was not taking care of them and "We will take care of ourselves?"

The Witness: If the law will not take care us we will take care of ourselves; that was their attitude.

The Presiding Judge: All right.

The Witness: Was then and is now.

The Presiding Judge: All right.

The Witness: We shut the wells down. We policed the area, we patrolled it, mounted and with motors. We had 16 off rangers that were placed under my command. The first few days I went with Captain Hickman of the State Rangers, visited every sheriff in the district, various police departments, conferred with them about the conditions, obtained their assurances that they would cooperate with the military authorities, assured them that we would cooperate with them. We have done that. Rangers are throughout the district. In some instances they have been remaining permanently with sheriffs' departments, in sheriffs' offices, others with the police department of Kil- [fol. 444] gore and at various places if and when needed. At Kilgore an epidemic of setting fire started; churches were burned down.

Judge Bryant: Was any of the oil property burned down there?

The Witness: No, sir, two churches, the Presbyterian and the Methodist, the only two white churches in town, as I understand it; they were burned on the same day. Many other places were set. No dispute, no question can be raised as to being set; I personally investigated and found the cloth——

The Presiding Judge: During what period was that?

The Witness: That was the Sunday—began the Sunday following our arrival in the area.

The Presiding Judge: All that you are talking about was in your first occupation?

The Witness: Yes, sir, in the first occupation.

The Presiding Judge: When the wells were entirely shut down?

The Witness: Yes, sir.

The Presiding Judge: All right.

The Witness: That continued off and on from the first Sunday after we were there during the week and including two Sundays following. During that time I kept soldiers in the town of Kilgore under the—in cooperation with the Chief of Police. I practically made my headquarters in the evening at the police department and we rounded up [fol. 445] people who were unemployed; we examined them,

unemployed and employed, I should say; those who could give an account of themselves were, of course, released; those who it was found to be were vagrants or gamblers or bootleggers were sent out——

The Presiding Judge: You attempted to enforce the law in that district?

The Witness: Yes, sir, I did it all over the district and kept doing it.

The Presiding Judge: All right.

The Witness: I may add that there have been hi-jackers too; there have been more hi-jackers arrested in that district, according to population, than anywhere in the United States, if I can estimate safely; the Rangers in connection with the civil authorities have acted efficiently. Then after the hearing of the Railroad Commission it was printed in the newspapers, the testimony was followed generally by the people. The papers were featuring and there they got the idea that 400,000 barrels or more would constitute a physical damage to their oil field.

The Presiding Judge: Who got that idea?

The Witness: The people did.

The Presiding Judge: Who gave it to them?

The Witness: They read it from the newspapers from the Railroad Commission hearings where experts testified, according to the newspapers, to that. I was not there. I read the newspapers and got the same impression that the [fol. 446] people did from reading those papers. That is their fixed idea. September 2 the Railroad Commission issued its order providing for an allowable of 225 barrels per day. I received an order from the Governor, which is in the record, I don't know whether it haw been introduced there, in writing, directing that I adopt as his order the order of the Railroad Commission in respect to that order and in pursuance thereto I issued a general order. I will have to look at the record to see what number it is, if that is material.

The Presiding Judge: It can be put in.

The Witness: Yes, sir.

The Presiding Judge: Go ahead.

The Witness: Later the Railroad Commission reduced the allowable to 185 barrels. Again the Governor directed that I adopt that order as his order. That was done. Subsequently the Railroad Commission reduced the allowable

to 165 barrels. Again the Governor ordered that I adopt that as his order. That was done. On the evening of October 13th William A. Vinson of this city was my guest at my headquarters. Approximately at 6 o'clock or a little past a newspaperman from Fort Worth telephoned me that Federal Judge Bryant, sitting at Tyler, had issued a temporary injunction restraining the Railroad Commission and myself from enforcing the order for the holding down of the allowable to 165 barrels. The newspaperman said that he did not want me to say anything about it, because he thought he had a scoop, that the other papers were asleep. To show my mental attitude about it I said, "I am afraid you are being spoofed; I don't believe that [fol. 447] Judge Bryant would issue a temporary order without notice in a matter of this importance."

The Presiding Judge: Now, what has that got to do with the situation?

The Witness: I want to show why——

The Presiding Judge: What you and the reporter thought on the subject.

The Witness: If your Honor will follow me——

The Presiding Judge: If that is just a criticism of Judge Bryant, I don't think this is the place to make it.

The Witness: No, sir, if your Honor please, I am cited to show cause why I should not be held for contempt.

The Presiding Judge: All right, that is what you are answering?

The Witness: Yes, sir.

Judge Bryant: I don't see why you had that impression, because I told you that I would not act on that matter until this matter was decided by this Court.

The Witness: All right. I will withdraw that. You know, I was listening to my lawyers here. Sometimes these lawyers are a nuisance. I will withdraw that. I thought I had to explain my conduct that night.

Judge Bryant: That will be taken up later and independently of this.

The Witness: Very well, sir. Without going into the [fol. 448] details, I reported to the Governor that an injunction had been issued according to reports that I had enjoining the Railroad Commission from enforcement of its order and enjoining me from enforcing their order. I stated to the Governor that if these wells were permitted

to be opened at the rate of 5,000 barrels, there would be serious trouble, that adjoining operators and land owners as well would seek to take charge of them to stop it. He directed me then over the telephone to not permit the wells to run at more than 165 barrels, to cease following the orders of the Railroad Commission, but absolutely his orders. I told him that his orders would be complied with, but I wanted it in writing. Later in the evening his secretary telephoned me with the written order of October 13th. I sent out details and found the wells running open and shut them down. I from then on followed the orders of the Governor with reference to the allowable. Immediately after October 13th, on the night of October 13th several people called me from Tyler and conveyed information that if all those wells were permitted to run open that there would be trouble——

Mr. Bailey: If the Court please, if the witness is going to repeat any such statements made as that, we would like to have the parties' names who made them; we don't object to it on account of its hearsay nature, but we want the people's names.

The Presiding Judge: You can cross-examine him; he [fol. 449] will be turned over to you for cross-examination.

Mr. Bailey: Very well, sir.

The Witness: The following day people came to headquarters and operators expressed themselves as apprehensive that there would be trouble if the field was permitted to run wide open again, as they put it. I received communications which I put subsequently in a deposition taken in Austin by counsel for complainants, some of those statements, and I shall refer to them to refresh my memory. Among those who called in person was Colonel J. Lewis Thompson, whom I have known for a quarter of a century. He is the president of the Land and Royalty Owners Association. He stated that if the wells were permitted to produce in a quantity to damage the field that there would be serious trouble and warned me about it. Colonel Thompson is an officer in the Texas National Guard serving in the Infantry Division, not on duty with me. Mayor Crim of Kilgore likewise advised me of impending trouble if the field was not held down. Frank Weaver of Long-

view, an operator, advised me to the same effect. M. C. Parrish of Overton had stated when we first came, under Lieutenant Colonel Calvin Garwood's investigation of the then impending danger of riot, that he was apprehensive—expressed apprehension that if the field was opened up there would be serious trouble. There were numerous others along that line. The Longview Chamber of Commerce passed resolutions in which they expressed the be-
[fol. 450] lief that at the time and prior to the declaration of martial law there were threats of outbreak and acts of violence on the part of indignant responsible citizens of the city and other parts of the county against the people who openly, flagrantly, and rebelliously violate the laws of the State and disobey the constituted civil authorities. That was the statement of the resolutions signed by the President, Mr. G. A. McCreight, and attested by Mr. M. D. Abernathy, Secretary. That was on October 27, 1931. On October 23, 1931, the city authorities of the City of Gladewater, wrote me as follows: "While we are law-abiding citizens and believe in upholding the law courts, we feel that in this instance the seriousness justified your actions, and sincerely hope that the injunction will be set aside at the hearing to be held at Beaumont within the next few days. If these operators had been allowed to flow their wells wide open, it would, in our opinion, cause a breakdown of our conservation laws and lead to untold strife and violence and probably cost the lives of a number of our citizens, as well as many thousands of dollars in property values." That is signed by B. F. Phillips, Mayor; H. C. Dunaway, Commissioner, and F. E. Stancil, Commissioner. And here is a telegram to the Governor, copy of which was sent to me, from the East Texas Chamber of Commerce, signed by Hubert M. Harrison, General Manager: "Executive Committee here today resolved that in their opinion your action in establishing martial law to preserve order, prevent disturbance, and conserve natural
[fol. 451] resources, was necessary and that removal of soldiers now would threaten the peace and dignity of the four counties so affected." Here is the telegram from citizens at Henderson, Texas, dated October 22nd.

The Presiding Judge: Have you got several more of them? Just state them.

The Witness: I haven't them in mind, your Honor.

The Presiding Judge: They all just state about the same thing?

The Witness: They all just state about the same thing; they all speak of danger through violence.

The Presiding Judge: Yes.

The Witness: Now, then, a letter from Mr. Capers, who was then a deputy supervisor in charge of proration on the part of the Railroad Commission. The letter was written on October 20th, warning against the same dangers and stating that he is mingling and mixing with the land owners and the operators in the discharge of his duties.

The Presiding Judge: And that made you very apprehensive that they might kill you and your soldiers, that if you undertook to obey the Court's injunctions that you and your soldiers would be shot down?

The Witness: I wasn't violating the Court's injunction; I obeyed the Governor's injunction.

The Presiding Judge: The apprehension in your mind was that you and your soldiers would be shot down in your [fol. 452] tracks if you undertook to obey the Court's injunction?

The Witness: My apprehension was and is now that if under existing conditions martial law is lifted, the soldiers moved away, there will be serious trouble in the East Texas oil field. My further apprehension is that if the Governor is denied the right and privilege, or some other agency, to control the production of that field, that there will be trouble. Now, if your Honor please, this is not my first service as administrator of martial law——

The Presiding Judge: Very well. This is the first opportunity you have had to make a speech about it. You can't do it on the stand. You are a witness. Go ahead.

The Witness: Your Honor asked me the question.

The Presiding Judge: I asked you the simple question whether you thought the troops were going to be displaced in that field, overthrown and destroyed, if the order of the District Judge was carried out. You don't have to make a speech. Were you afraid or not?

The Witness: I was apprehensive there would be trouble, yes, sir.

The Presiding Judge: And that you could not control it?

The Witness: I don't want to have to kill citizens if I can help it; I want to so handle martial law and preserve peace without doing that if I can help it.

The Presiding Judge: You are a witness now, neither [fol. 453] a general nor an advocate.

The Witness: All right, I will answer your questions; I was apprehensive.

The Presiding Judge: Did you have apprehension that the power of the State would be insufficient to carry out the orders of the Judge of the Eastern District of Texas?

The Witness: I did.

The Presiding Judge: All right.

The Witness: There have been numerous land owners and operators who have talked to me from that time on and continually do about the situation.

I had representatives of the military force, both soldiers and rangers, out doing intelligence work in the oil fields, among the men that live in the military zone and work in the military zone, at all times since I went there and after the declaration of martial law. Those men doing intelligence work were not all uniformed men. These men have been bringing reports to me from day to day as to the attitude of mind of the people and conditions that prevailed with reference to the observance of law and order in the area covered by this proclamation of martial law. In addition to these sources of information as to the condition of mind of the people, there have been very many people who have talked to me directly over in that area.

The reports that my officers and men out there in the [fol. 454] military district have brought to me from time to time have induced in my mind a belief that the open and unrestricted production of oil from that field would result in physical violence. The reports brought to me were to the effect that there would be used dynamite and other explosives for the purpose of destroying pipe lines, tank farms and oil wells, and that the torch would be applied to property in the event the field was thrown open to the unrestricted production of oil.

Each time the Railroad Commission made an order, following its order of September 2nd, the Governor directed me to cause the order of the Railroad Commission to be enforced, thereby adopting it as his order, up until some time in October. Since October 1, 1931, the Railroad Com-

mission has not attempted to function in that field with reference to proration, using the word "proration" to distinguish from such other matters as requiring certain equipment to be applied to the wells, and things of that kind; that is all conservation and the Railroad Commission is doing that. The Railroad Commission has not undertaken to enforce any order restricting the production of that field except those orders that would require them to produce through tubing and require them to control the manner of bringing in wells and the spacing and location of wells and things of that kind. The Commission has not undertaken to enforce any order attempting to control the ultimate production of the field within a given allowable since October, 1931. They quit on October 13th [fol. 455] and since October 31st they have had no order at all. I understood from the lawyers that after October 31st, whatever order they had existing at that time expired by its own terms on October 31st. Since October 31st there has been no order in the East Texas field to control the production of oil over there save the order which was given to me by the Governor.

From the information brought to me by my men and by the citizens I knew over there and came in contact with, if this field had been thrown open to the unrestricted production of oil on October 31st, I think, with the facts before me at that time, that it would have resulted in instances of physical violence, the use of fire in the destruction of property and explosives in the destruction of property. At all times since I have been there in the enforcement of martial law, I think that the open and unrestricted production of oil in that field from all the wells or the majority of them would have resulted in violence. It is my judgment now that if that field is thrown open, if all restrictions were lifted on that field today, and the field thrown open, that destruction of property and violence would result.

I have taken action to bring home to the Governor, my commanding officer, such conditions as were brought to my notice over there. I have heard of direct threats of violence to persons and property. There have been many [fol. 456] of them in a general way, but I have had some direct ones that we had to deal with. For instance, Mr.

Gibson, a landowner 72 years old, found trucks taking oil from the wells on his lease between nine and four o'clock in the night; he found they had taken some 400 barrels in that manner, and he stopped them with a shotgun. He found that it had been sold to the Overton Refinery, Mr. Wrather's refinery at Overton, at 35 cents, instead of the posted price of 83 cents. The old gentleman was on the warpath. He had a shotgun and he was looking for somebody that was responsible. We took him in charge and prevailed on him to cool down and we took charge of the investigation, furnished him with the result of the investigation so that he might take such steps through his attorneys as he wanted to take. That matter did not involve a violation of our orders on the allowable, or the Governor's orders.

Immediately prior to the declaration of martial law there appeared in the large daily papers of this state the report that state enforcement officers, Captain Frank Hamer, I believe namely, had stated that there had been discovered or uncovered a movement to dynamite pipe lines over in that area, and the Adjutant General instructed me to take extra precautions because he had evidence to that effect. I know that immediately before, and perhaps about the time of the declaration of martial law, a number of the oil companies, the Humble Oil & Refining Company particularly, had engaged under private employment officers over [fol. 457] there for the purpose of protecting their property against the torch and dynamite. The Humble Oil & Refining Company particularly had a very large force in the field. If the field was thrown open to an unrestricted production of oil, I think in my judgment that there would be violence; I am sure of it.

The Court asked me if I was afraid that some of my men might be shot down. I am afraid any time that trouble starts that some of these young lads who are in the Guard will be shot down, certainly. I am also afraid that under my orders or the orders of the officers, they will have to shoot down citizens. I want to avoid, if I can, riot and mutiny, without using lead. I have done it various times; I have been on martial duty where conditions have been very serious, and I hope to get through with this one now without doing it. In other words, I don't want to be

responsible, directly or indirectly, for killing anybody, if I can help it.

I reported these conditions to Governor Sterling, and since the Railroad Commission's orders have expired and since their expiration the Governor has been issuing his own orders, I have from time to time advised him of the condition of mind of the people as it existed in that area, and made that disclosure to him in advance of each of the orders that he has made from time to time affecting the production in that field, and I have prevailed on him to come to the field himself and go through it and meet the [fol. 458] people face to face, and he did. It is my belief that undertaking within reasonable and proper bounds to control the production of oil over there is an effective and efficient means of suppressing and preventing any kind of rioting and destruction of property, and I think it is necessary as a means of preventing it. As to whether I have the alternative of a fight or doing that thing, if I may amplify that from a military standpoint, I will say that I can take the detachment that I have there, with machine rifles and machine guns, and I can meet a crowd, a mob. But there are thirty-six hundred odd wells and more in the field now; there aren't enough men in the National Guard of Texas, or hardly in the regular army and the National Guard of Texas combined, that could protect that field from sabotage. You would have to put a non-commissioned officer, and a minimum of four men to each well, eight hour tour, which multiplied by three, it would take sixty odd thousand men to do that alone. You would have to then provide guards for the storage within the field, the tank farms and then the pipe lines, and, bear in mind, a pipe line blown a hundred miles from the field is as effectively stopped as if it is blown in the field. I have with my staff and on my staff able military men who have served overseas. We have not been able to work out a plan whereby we can protect that field because we are not looking for a howling mob; we are looking for sabotage when it starts. My judgment is that in order to preserve [fol. 459] law and order in that field, you have a choice between a fight with arms and the control of the production of that field. That is absolutely my viewpoint about it and that is the way I presented it to the Governor from time to

time, and in my judgment the fight would be ineffective if it came the way that it would very likely come.

If fire started in one place or if one oil well was fired over there and turned loose, I think it would spread very rapidly in that area. That field is peculiarly a fire menace, and I think everybody will agree with that. I have reported these matters and these views to the Governor of Texas fully, and have discussed them with him fully. There is no way that I could protect the women and children residents in that field over there if the matter became acute enough that people wanted to undertake to destroy property with fire and explosives.

The Presiding Judge: I want to ask him one or two questions.

Examination by the Court:

Q. What is it that keeps peace over there so magnificently now?

A. Because the oil field is under control, less than 400,000 barrels, and it is not being damaged.

Q. Under control. Suppose the popular mind would suddenly change and tell you that you must have 800,000 [fol. 460] or 100,000 you would have to do it to keep out of trouble, wouldn't you?

A. I don't think that that is the case or would become the case, your Honor.

Q. Why not?

A. Well, because they have fixed upon the idea that 400,000 is the limit.

Q. Who fixed them on that idea?

A. I explained to your Honor a while ago, the hearing before the Railroad Commission, which was from August 25th, day after day, fully reported in all the newspapers, and there it was testified that from 250,000 barrels to 400,000 barrels was the amount that should be produced with safety without physical waste and destruction in that field.

Q. Now, then, you say they have got an idee fixe- on that field?

A. Yes, sir.

Q. And 400,000 is the top. They didn't get that from these oil producers and oil operators and the committee

of Governors and all these things we have been hearing about; they got it out there in the field from hearing somebody testify before the Commission, and unless you obey this impalpable demand of 400,000 the State is in a state of insurrection?

A. That is the situation exactly, your Honor.

Q. And if the allowable—if you don't keep right with that allowable and change it every time it runs over 400,000, you have got an insurrection out there, haven't you? [fol. 461] A. Let me add this, the further fact has been demonstrated that every time it runs over 400,000 the gas pressure, the tubing pressure——

Q. I am not talking about that.

A. But let me tell you how it affects the people.

Q. I am talking about the people.

A. Well, I am talking about the people; they know what is going on; they know when the pressure reduces, when the tubing pressure reduces, because they get that information.

Q. What people is it that gets it?

A. The oil operators, the oil land owners.

Q. You mean the Texas Company?

A. No, your Honor, I have never talked to the Texas Company about that, and I rather resent that insinuation because unfortunately, as a National Guard officer, I have to have a vocation or profession.

Q. All right.

A. And I happen to be employed by the Texas Company.

Q. You are one of the general counsel of the Texas Company?

A. No, sir, I am not a general counsel; I am one of their attorneys.

Q. They know it, the Humble Company knows it?

A. Yes, sir.

Q. What are the large companies there that know all this? What are the real operators up there, the biggest? [fol. 462] A. The Humble, the Gulf, the Sinclair, the Shell, the Texas, the British-American, Yount-Lee, Roeser & Pendleton, and then there are many, many small producers.

Q. I know; now, what I am getting at is this; is it the larger companies that are going to cause trouble?

A. No, sir.

Q. Or the little companies or the land owners, or who is going to cause this trouble?

A. The people that are going to cause the trouble are the little operators plus the landowners and the royalty owners whether they are operated by the big companies or the little companies.

Q. And the little owners in that field have got this feeling which keeps martial law a permanent thing in the field, because whenever you get it down below 400,000 you have got to have martial law?

A. That is their feeling.

Q. And you think, according to your statements, that martial law as you call it, or suppressing an insurrection, whatever it is, has got to be maintained there permanently in East Texas fields, because you will always have this trouble?

A. No, sir, it will not have to be maintained there permanently.

Q. Why not?

A. If and when the Railroad Commission will pass an order and with the Attorney General enforce it, that will [fol. 463] be all that is necessary.

Q. All right. Now, suppose the order which the Railroad Commission passes and which the Attorney General is to enforce, is an invalid order as claimed by the plaintiffs in this suit, you have got to have martial law if the law is invalid.

A. You have got to have martial law, yes, sir, until the civil authorities can, under a proper law, if this law is not constitutional, or a proper order, if this order is not valid, execute the laws.

Q. Now, then——

A. (Interrupting.) You have got to put something in that void.

Q. It brings you down to this proposition, that East Texas is in a state of permanent insurrection until some valid conservation law is passed and enforced, and troops have to be maintained there until the situation can be complied with my some valid law?

A. I think so, if your Honor please, but I believe, if you will pardon the suggestion, I believe we have a law that is constitutional now.

Q. Well, maybe it is constitutional; maybe the Court will find it.

A. Well, if the Court will find it our trouble is ended.

Q. So what you are trying to do is to enforce the conservation laws in the absence of the enforcement by the Commission?

[fol. 464] A. That is the effect of it; yes, sir, but we are doing it in order to maintain order and peace.

Q. I know, but I mean that's what——

A. (Interrupting.) Oh, yes, that is the effect of it, Judge.

Q. What you are having to do there is enforce the state conservation laws because the Commission has been enjoined from enforcing it?

A. That is the effect of it, yes, sir.

Q. Now, the Court having granted the injunction against the Commission, changed the situation theretofore existing, is that it?

A. It did; yes, sir.

Q. Before the Court's injunction was issued, everything was going all right and you had no insurrection there?

A. Oh, no, we had to help enforce the law, but the point was this, that we could have left any time that a test case had been made whereby the Attorney General could have brought suit under the state statute for penalties; the penalties are very severe, and if these people had violated the law and been detected at it and the suit had been brought, why, we could have—and that had been upheld, we could have gone away; we can't do it now.

Q. What the situation is is this, as I get it from you, see if this is correct, that because of the question raised as to the constitutionality of the law, by the decision of [fol. 465] this Court in the Macmillan case, there was an uncertainty about the law and it needed military force up there to hold it until some court could declare it legal. Is that it?

A. Well, I don't know about that; I am just speaking of the conditions; I didn't go into that end of it.

Q. I thought that was what you said.

A. That is not in my mind as far as that is concerned; my mind was simply to maintain order.

Q. I thought you said that as soon as the Attorney General could have a lawsuit tried and the matter tried out——

A. (Interrupting.) Here is what I think: at the very time, or just before this injunction was issued, we had presented a case, the Railroad Commission authorities and the military authorities, of fact, that we believed justified the Attorney General in bringing a suit for penalties. I don't know what action was contemplated through the Attorney General by the Railroad Commission, but I had been led to believe that they were going to bring that suit when this injunction came to stop their work up there.

Q. What I mean—I am not trying to fix upon you or define rights, but I want to find the ground that the thing stands on. You say it is not necessary to maintain an insurrectionary force there for that in the East Texas field; you don't think that do you?

A. No, sir, whenever the civil authorities can take hold [fol. 466] of it and control it, and will control it, we can go our way.

Q. Just as soon as the civil authorities will pass a law, or enforce the law in accordance with the will of the people who live in that section, that 400,000 barrels is all that ought to be produced, why, then, business will run, and until they do that there is an insurrection?

A. Until the present law can be enforced. And I am of this opinion too, that if upon a further hearing it be established to the satisfaction of these people that 300,000 or 600,000 is the proper allowable, it would satisfy them, provided always that every producer, big or little, must obey the law.

Q. I understand, but I am getting a little more clear; you don't think there is an idee fixe- in their minds about 400,000?

A. There is now, yes sir.

Q. That might become 600,000 or 300,000?

A. No, there is an idea now that 400,000 is the allowable.

Q. But you think that could be taken away?

A. Yes, I think they could be educated from that.

Q. So the situation that the state is in now, is that there is a state of insurrection because certain people in East Texas have got an idea in their minds which they won't give up, or which they haven't given up, and until they can be changed in that idea or until the State will conform to that idea, insurrection will continue. Is that it?

A. That is my idea about it.
[fol. 467] Q. All right.

Direct examination (continued).

By Mr. Moody:

His Honor asks me if I was enforcing proration or the conservation statutes up there. There is no order of the Railroad Commission or any other regulatory body now in force in the East Texas field. What I am doing up there as commanding officer of the military area is not enforcing the conservation laws of this state or the acts of the Legislature dealing with the production of oil and gas, but preserving the peace and maintaining law and order.

The Presiding Judge: Let me ask you one question there. Is it necessary to preserve the peace for you to change these allowables whenever the total gets up above 400,000?
The Witness: I think so; yes, sir.

Cross-examination.

By Mr. Nickels:

I have been over this military district frequently since August 18th, and have seen the District Courts in session in each of the counties; I have seen the sheriffs' offices and forces, and the constables' forces operating, and in some of the towns the police forces; I have seen Justice Courts and Corporations Courts all over that district, and the State and the Federal Courts are all open. I have not heard of any obstruction of those courts or any of their processes. [fol. 468] I can not name a single instance of the obstruction of any civil officer in the execution of any process; we have aided them in the criminal processes. I don't know of any civil officer who has failed or refused to execute any civil process since I have been over there.

The truth of the matter is that the civil officers, the sheriffs and constables and police forces and the courts, have been going right along just like they have always done so far as I know. When I advanced to the occupation of this district I had approximately 800 cavalrymen and 75 or 76 officers, and then detachments from the medical and the trains of the infantry; altogether somewhere between a

thousand and eleven hundred. Then I also had some rangers.

Q. Well, when and where did you storm the stronghold of this insurrection? You found an organized insurrection with generals in command and dynamite and nitroglycerin and arms of all sorts, didn't you, threatening the peace and dignity of the state. Did you have any battle or disburse the rebels?

A. No; replying to the sarcastic question of counsel, I prevented them by shutting down, in compliance with the orders of the Governor, the wells that were running wild at that time.

Except in isolated cases I have found no insurrection, armed or in the act of violence, since August 16th. I think Mr. Gibson comes pretty near being an insurrectionist, the 72 year old gentleman I told you about a few minutes ago; [fol. 469] he was very riled and active. He was not arrested and put under a peace bond, but we took charge of him and proceeded to get the facts for him, aided him by sending auditors in and getting the records for him. I found no men in insurrection but I found many people who were wrought up and in a high state of mental disturbance because their royalties had not been paid them, and because oil companies, big and little, had not paid them the royalties, making this excuse or that excuse. I have not found any men over there armed, so far as I could tell, for the purpose of resisting the law or the officers, and I have not found any bodies of men there armed or unarmed. The day the fire bug got under the church and those eight other buildings there in Kilgore, I think there were thirteen rangers there, and I had probably sixteen soldiers there. We didn't capture a single one of the fire bugs; we arrested many suspicious characters that we investigated, some were detained, some were found to be criminals, and other things that the peace officers, the civil authorities, wanted them for. Those that were found to be criminals we turned over to the civil authorities and the rangers made charges against them. I personally ordered some sixty odd to leave town by sun-up. Charges were not made against those persons in the civil courts.

In the performance of what I conceive to be my duties in the administration of this rule in the military district, I

recognize no other authority except the Governor of Texas. [fol. 470] So far as I cooperate and have anything to do with the ordinary civil authorities, it is merely by way of getting advice or taking it or leaving it as my judgment may dictate. However, under the proclamation of the Governor, my duty is to enforce and maintain the majesty of the law. If I find the civil officers not arresting bootleggers, and letting them run rampant, I would take charge of that enforcement of the law, and if the civil officer was interfering, as they have sometimes, as they did at Galveston, and as they did at Borger, as they did at Mexia, I would take charge of him and I would hold him until the matter had been disposed of and he couldn't do any more harm. If I could find evidence that he had violated the civil law I would prefer charges against him and turn him over to the civil authorities, but if I didn't find evidence which in my judgment would justify the making of a complaint, yet in my judgment he would be a dangerous citizen or an insurgent, I would still hold him. If I thought he was an insurgent, and if I thought he was furnishing information to the outlaws so they could make their get-away, I would hold him until I had accomplished my mission. As to whether this power that I am exercising is wholly independent of any other authority at all except the orders of the Governor, I will say that I obey the orders of the Governor and am responsible for my acts.

I do not know anything about who circulated these petitions that have been referred to in the depositions, either [fol. 471] personally or by hearsay. I know Mr. Capers; I referred to his letter there. Capers at that time was a deputy supervisor of the Railroad Commission; I don't think I copied his letter in full in my deposition, but he says "It will result, in my opinion, not only in loss of property, but in rioting and in bloodshed, that will permit I. W. W.'s or Reds to get in their pernicious work. I am basing my opinion upon talks I have had with practically all the operators and land owners in East Texas. These gentlemen are all agreed that the above things are not only probable, but will inevitably happen if martial law should be lifted in East Texas and the fields thrown wide open. Numerous royalty owners have come into my office and have stated that if the courts do not protect them from those operators who desire to steal their oil, they propose

to take the law in their own hands, even though they have to use shotguns."

I don't know whether Capers came into East Texas holding a job with the Railroad Commission or not; the first I saw Capers he came as the deputy supervisor of the Railroad Commission in charge of proration; that was in September when they made the first allowable, or maybe a little time before that.

As a matter of fact, there was quite a crowd of the so-called supervisors of the Railroad Commission in the territory at the time I went over there, and there still are. Those fellows did not write petitions, but they did write me letters, [fol. 472] the way I view it, they are not very cordial with me or with the Governor. Those gentlemen they are in contact with quit the field and C. V. Terrell, himself, the chairman, said it would not do for the Governor to take us out after he had been through the field.

It is not a fact that all of these employes of the state whose jobs depend on that thing over there are amongst those who signed these petitions; aside from Mr. Capers there is Mr. Lawder, Mr. Walthall, Mr. Shelton and Mr. Swift who have signed the petition. There are probably 50 or 60 employes there.

When we first went there we were investigating the situation with reference to the nonpayment of royalties, and Lieutenant-Colonel Calvin Garwood of this city was detailed in charge of that work, and he with some other officers visited various sections of the district with a questionnaire, and got responses from them about the situation at that time, and that information was used and furnished to the Governor to show that situation and what companies were owing royalties, and it appeared very generally, both large, major companies and little companies.

As to whether it is a fact that a good many of the names appearing on these petitions and in these letters which have been referred to in those depositions, come from employes of the State or people whom they have asked to sign petitions or write letters direct to me to Governor Sterling, I will say that there are five or six Railroad Commission em- [fol. 473] ployes from whom I received letters. If there are any other state employes from whom I have received letters, or who signed any petitions or resolutions, I don't know it, and if anybody among the military forces or rangers asked

anybody to sign any petters or petitions, then I never heard of it. I know Rade Kangerga of Henderson. I have not noticed how many times his name appears on those petitions. I know it appears on there from Henderson; I think there was a duplicate there, but at least it appears on there.

The men we had doing intelligence work in the district reported in some instances that so and so said that if the wells were opened wide up and the law did not stop it, he was going to take guns and stop it, with those adjacent to him. There have been reports of that sort.

Examination by the Court:

The Presiding Judge: Was there at the time before you went in, or when you got in, or has there been since, any actual state of insurrection, or is it just a threat or imminent danger of insurrection?

A. It is a threat of imminent danger, constantly maintained.

Q. But there has never been——

A. No, sir.

Q. Have you had to go in and suppress an insurrection?

A. No, sir.

[fol. 474] Q. Was there any insurrection ever on foot?

A. On foot? I think so, but it did not develop because they knew we were coming and the wells were going to be shut down, because I had sent officers up there the day before to locate the camp sites and the newspapers had notice of it, and then the Governor had told this company of producers and operators that he was going to do it on Saturday, the 15th, and they took the news back to their fellows.

Q. What I am trying to find out, for whatever effect it has on the law of the case, is whether there was or has been any actual insurrection which the troops suppressed, or whether there was threat of insurrection which the troops were called out to prevent.

A. There was a threat of insurrection and I verily believe that if we had not reached there when we did, or if the Governor had not let this committee know that we were coming, there would have been insurrection on Sunday before our arrival.

Q. What do you mean by insurrection as applied to that, please?

A. They would have, with armed or other means, undertaken to shut down the wells that were producing beyond the then allowable.

Q. You mean by "them"——

A. I mean the land owners.

Q. Who is organized and entrenched? Did you think [fol. 475] there was a body of men or was it individually?

A. Organized and entrenched insurrection, as viewed at that time. If your Honor please, were those who were violating the conservation law as it was written, whether it was valid or invalid.

Q. Those men were not insurrectionists; they were just violating the law.

A. That is what the reference is, as I interpreted it in that proclamation.

Q. Oh, I see.

A. But the other people were the land owners and the small operators who had no connection; understand, please, that while that big production was going on, many of the little fellows who had one well could not get rid of their oil; they saw the fellows next to them taking their oil, drawing it away from them; they were as much involved in stopping it as were the land owners. These people who come down to see the Governor were that type; the 1500 who met in Tyler, by the resolutions they adopted unanimously——

Q. (Interrupting.) The proclamation you refer to them, was for you to stop an insurrection which you were afraid of occurring, and to stop people from taking oil contrary to the law of the State, wasn't it?

A. As I interpreted the proclamation, if your Honor please, it was that there was a state of insurrection on the [fol. 476] part of certain oil producers who were violating the then existing conservation laws, which was being*ing* on a conflict down there too, and it didn't make any difference to me for practical purposes, who the bad boys were; my job was to stop the row. I am not at all interested in how much oil they produce or what price they get for it. I would like for some constructive judge or statesman to find some way to get me out of East Texas without leaving the situation damaged; very much so. I am tired of living in a tent; it is cold up there.

Recross-examination.

By Mr. Bailey:

The talk in the martial area is constantly that if the law can't protect us, we are going to protect ourselves; that is the expression. That is a threat against the properties in that area but I have heard no threats that the constituted authorities of the government in that area are going to be thrown out of office or thrown out of power, but the constituted authorities could not stop such an insurrection, even if they wanted to. As to whether I have heard threats against the constituted authorities of the State of Texas to organize a separate government, or to overthrow the existing government, I am not going to say "Yes" or "No," because I haven't undertaken to define the fine distinctions, whether a crowd of people who go there and take charge of property are setting up a separate government against the sheriff and the constables. Again, I surmise that the sheriff [fol. 477] and the constables up there would not be bothered much if they did take charge of the field under those conditions, because they are in sympathy with their people.

I have had some reports from these intelligence men of various parties who were going to take the law in their hands. I never have arrested a single solitary one of those men because they have not committed any overt acts, but I have kept them under observation and they are still under observation. There are threats being made against Mr. Wrather and his refinery; I am watching that situation as closely as I can. I am not protecting all of the property up there from all of the men that I have heard the names spoken of who might enforce a threat, because the threat has been against those who were seeking to run the wells wide open. There have been very few names of men that the Intelligence Department has given me who have issued any such threats as that, that is, given me the names of those who said themselves that they would do so and so. The Intelligence Department has found out who they were, but they have given me very few named of men who said within their hearing what they will do if such and such a situation arises. Referring to the specific instance I spoke about, of Col. Thompson, I don't think he gave me the names of any of these people who were going to use violence, and I don't think I asked him for them. Mr. Crim

did not give me the names of any persons who were going [fol. 478] to use violence; he just talked about the community as a whole. I have made inquiry, though, as to who these people are who are going to use violence, and I will tell you who they are; they are the people as a whole, they are the land owners, they are the operators, and they are the citizens generally who live there who are in sympathy with them. Except in a general sense, I have not made any effort to find out which ones of the particular land owners are going to take the law into their hands. I haven't singled out particular ones, but I do know that there are men there who will undertake to protect their property. I have never made one single, solitary move to do anything except to restrict the production of oil in that field; however, I am prepared to meet any emergency that may arise within my ability to cope with it, and I think I will. Restricting the production of oil is the only effort to which my soldiers have been directed, and keeping a lookout, of course.

At the time martial law was first declared, the trouble was because many of the operators were unable to sell their oil and they insisted that the man next to them should not be permitted to sell his oil, and the purpose of the orders of the Railroad Commission and of the Governor commanding my forces, is to provide them equal and ratable withdrawals.

Redirect examination:

Counsel calls my attention to the last question asked by Mr. Bailey. Mr. Bailey said that the purpose was to provide for equal and ratable withdrawal. That is the effect, [fol. 479] and I don't split hairs about words, that is the effect of what we are doing. We are seeing that the poor fellow who hasn't a pipe line gets a connection; we see that he gets an equal shake with the Texas Company and the rest of them, since they have used the Texas Company; and that is to prevent trouble. However, that is not the objective I have in being in East Texas; my objective there is to maintain peace and order, and in order to maintain it I am doing that just like at Galveston I took charge of the hardware stores with the arms and ammunitions, just like I prevented the citizens from exercising their constitutional rights to go on the wharves.

Counsel states that our statutes provide that the Governor has the power in case of insurrection, invasion, riot, tumult,

breach of the peace, or imminent danger thereof, to call the National Guard into active duty. Referring to the various terms used in the statute, counsel states that the word "tumult" and the word "riot" mean unlawful violations against property, that the words "breach of the peace" as defined in the statutes to be unlawful assemblies, affrays, disturbances of the peace and assault and things of that kind, and that the word "riot" of course, would include the destruction of property and physical violence towards either persons or property. Counsel also calls attention to the fact that the statute used the words "imminent danger." I believe that now and at all times since I have been there, that if martial law is lifted there would be imminent danger of [fol. 480] some of these things happening; that is, insurrection, tumult, riot, breach of the peace, and such things. Here is exactly what will happen: some of these men will open their wells wide open with the result that there will be others attack them to close them down, and the row is on, and it will have to end somewhere. To prevent the occurrence of those things is absolutely the reason that production is restricted, and I have so reported and advised the Governor of Texas.

In addition to being a military official under the Governor of Texas, I have known him for approximately twenty-five years. Counsel's statement is true that for the last twelve years whenever the Governor was about to declare martial law, or in most instances at least, if not in all but one in the last twelve years, where martial law has been declared, I have been consulted and advised with by the Governor at or about the time or prior to the time of declaring martial law, and in some instances I have been sent to make the investigation and report and recommendation to the Governor, and those facts, I presume, were known to Governor Sterling; that is a matter of public record.

(Thereupon an adjournment was taken until 9:30 o'clock A. M. January 5, 1932.)

[fol. 481] January 5, 1932—9:00 o'clock A. M.

COLLOQUY BETWEEN COURT AND COUNSEL

The Presiding Judge: Are you ready to proceed, gentlemen?

Mr. Bailey: If the Court please, may I take up a matter before we proceed? Mr. Nickels and myself last night, in studying over our pleadings, in view of the question raised before the Court yesterday, arrived at the conclusion that the amended bill sufficiently alleges the acts of all of the respondents to have been in purported compliance with House Bill 25 Chapter 26 of the Acts of the Legislature of the 42d Session, but we do not find the specific allegation except that the general allegation that those acts were in purported compliance and that they were void and contrary to the Constitution, and then follows the Acts themselves, and in order to remove any question of doubt as to the jurisdiction, we respectfully ask leave to file an amendment to our bill, and, particularly, to that paragraph number 37 which is found on page 27 and which is as follows; concluding thus: "But that the respondent Hon. Ross S. Sterling, Hon. W. W. Sterling, and Hon. Jacob F. Wolters, have, by the use of force at their command and under arms and with threats of violence since this date, October 31st, 1931, compelled these complainants to so restrict the production from their wells of oil and gas as outlined hereinbefore," and then to add "And in so doing and in *and in* proposing and threatening to continue to do such [fol. 482] and like acts, the respondents have acted and/or claimed to act and will continue to act under authority or claimed authority, and in claimed enforcement of the aforesaid Chapter 26, House Bill 25, Acts of the 42d Legislature of Texas, which statute and the acts of respondents in purported authority thereof are and will be void, because contrary to the Constitution of the State of Texas and of the United States as hereinbefore set out." We think that the amendment is to a certain extent immaterial and raises no new matter; the real question in this case as it is presented now on the answer is whether the statute under which they claim to act now, that is the statute providing for the calling of the militia, gives them the authority under the Constitution of the United States or whether it is contrary to the Constitution of the United States, but in order to present the issues properly from the beginning as well as the end we felt like it would be better if we could be permitted to file that amendment and we respectfully ask leave to so file it.

Mr. Page: May it please the Court, may we be heard? If your Honors please, if this amendment raises no new matter, as counsel says, then it is certainly unnecessary to file it in this cause. If it does raise new matter, I suggest, your Honor, that it prejudices very violently the cause of the defendants in this case. If I were of the opinion that this amendment did not raise new matter, certainly we [fol. 483] would not oppose the amendment. If it merely brought up to date, I would not oppose it. But this amendment, your Honor, is a jurisdictional amendment. I think that this amendment would allege a cause where a particular Court composed of three Judges would have jurisdiction. It is not my opinion that the amended bill without this amendment alleges such a cause of action. There are two points in this amendment that are not raised in the amended bill, the first is that we have acted or claimed to act and will continue to act under authority or claimed authority and in claimed enforcement of Chapter 26; that allegation does not appear in the original bill; that is the allegation which would confer jurisdiction upon a Court constituted of three judges. It is not alleged anywhere in the amended bill that we are now acting or threatening to act under any conservation law or any order of the Commission. There is much in that bill about what we did do in the past, but there is nothing in it about what we are doing in the future. Your Honor, I earnestly contend that this amendment puts the defendants to trial on a cause which did not exist until this moment, when this amendment was sought to be filed, and I respectfully ask that it not be filed, or, if already filed with the Clerk, that it be stricken.

The Presiding Judge: What is the object of the opposition? You speak of this as though it were a trial. This is not a trial; this is merely an application——

[fol. 484] Mr. Page: Yes, sir.

The Presiding Judge (continuing): —in Chambers for an order of injunction. Now, I will follow your own position and go with you as far as you go. Suppose we say, "You are right, that this does bring into the matter an allegation that the action is done in pursuance of a law which is unconstitutional and makes a case for the decision by the three Judges, whereas, as it stood before, it was only by the one Judge." I think you have a misconcep-

tion, or I have, of the Court. The Court is not at all affected by the fact that there are two Judges here; the Judge of the Eastern District has jurisdiction of this clearly.

Mr. Page: Yes, sir.

The Presiding Judge: The only thing is whether Judge Grubb and I participated in this decision; it doesn't make any difference what the allegations are; if you have no case under Section 380 which requires two Judges to join with him, it seems to me that our views are immaterial and Judge Bryant decides the case. If what you want to do now is to prevent the matter from coming to a decision——

Mr. Page: Oh, no.

The Presiding Judge: —by three Judges, of course, you can do it. Now, if we should conclude you are right, we won't adjourn here for two or three days. These gentlemen can file another bill while we are here and this thing [fol. 485] of three Judges, bringing one from Alabama and all that, that is troublesome, I would be inclined to say for my associates if this point that you take is right and if these plaintiffs try to get the point brought up, "We will just wait here and let them file another bill, let Judge Bryant convene the Court and let us sit while we are here." I mean, what is the practical thing that you are trying to arrive at?

Mr. Page: I assure your Honor this; that your Honor has accurately stated the first part of our proposition; the second part of it is that if this amendment is filed, a case exists before Judge Bryant that did not exist at the time the amended bill was filed. We would be called upon before Judge Bryant to answer to an entirely new case demanding proof of other facts and, of course, Judge Bryant could, if he saw fit, forthwith issue his temporary restraining order, but I just say with all due deference that I don't believe that would be his course of action at this time, and that he would permit it under the present circumstances of this case after this amendment has been filed, after the case has come to trial on an amended bill, to have a hearing and give us sufficient time to prepare our evidence on that point. In other words, your Honor, my idea of this proposition is that Mr. Bailey's bill is not in this case what he might wish it to be, but what he has made it; that complainants have made their bed and they must lie in it; that they have come to trial in one case and that justice

does not require, and that it should not say that we should [fol. 486] be put to trial on another case before three judges or before one judge.

The Presiding Judge: Why would it be different if he filed his bill today and we organized the Court for this afternoon? We can do that.

Mr. Page: The Court can certainly do that.

The Presiding Judge: Yes; I say what is the use of just marking time? The Court is disposed to dispose of this case on this sitting and not have to come back here in February or some other time, and if he can file a new bill and discharge his case altogether, I would be disposed to sit here; I don't know what the others would be disposed to do.

Mr. Page: I can say this, that your Honor's anxiety to pass on this case is matched by our own, not only to have it passed on, but by this Court.

The Presiding Judge: If this is dismissed and we don't have to pass on it, that is the best solution so far as I am concerned. I don't like to decide it, but if we have to decide it again, I want to do it now, because I have to be on the Circuit Court this week; I have put off the Circuit Court during this case. The practical solution would be, I haven't talked with my associates, they may think there is nothing in your point, but if there is something in your point, why isn't it better to let it be filed and you take whatever point you have got about it and let us go on with the matter instead of stipulating that evidence all in again [fol. 487] and trying it all again this afternoon?

Mr. Page: Your Honor, my answer to that proposition is this, that what your Honor suggests is tantamount that in order to have this case tried at this time we should answer to a bill which is presented to us in the trial of the case, demanding other and a different character of evidence, that we should sacrifice the right which we believe the Court would accord to us of a little time to prepare our case.

The Presiding Judge: Now, that is something practical; what is it that you have got to prepare that you are not prepared on?

Mr. Page: It is not claimed or argued or asserted in the bill which was before us, that we have acted under authority of House Bill 25, Acts of Forty-second Legisla-

ture of Texas; that is point one that is not stated in the bill.

The Presiding Judge: What have you got to prepare on that that you are not already prepared on? Counsel said in the opening that you were not acting in the enforcement of any law. You read from your answer that you were not acting in the enforcement of any law, but to keep the peace.

Mr. Page: Quite right.

The Presiding Judge: I mean what does it bring into the case that requires other evidence than what you have come here with?

[fol. 488] Mr. Page: In the first place we have no evidence at this time, and as a practical matter I dare say we could get our evidence—the evidence along that line is largely as to this, and I might as well just state the whole thing right now for, I had intended to do it in stressing my argument, and if I get out of bounds in this you will rather understand why it is. The Conservation law which is House Bill 25, Acts of the Forty-second Legislature of Texas, does not prohibit anybody from producing any given amount of oil by its terms. That every order which has been enacted pursuant to that statute has expired by its terms, and I don't see how counsel can allege that the only act complained of, which is a restriction of oil to a certain point, is the enforcement of a law which does not restrict the oil production.

The Presiding Judge: Counsel, with due deference, I think you are just arguing the case.

Mr. Page: Well, I was afraid I might do that.

The Presiding Judge: What evidence is it you haven't got that you might want?

Mr. Page: Well, that might be done.

The Presiding Judge: Yes, you have the two actors, the Governor and the General, here.

Mr. Page: Your Honor, let me make the suggestion, in order to accelerate the progress here, it might be that if we could confer for perhaps ten minutes, and then perhaps confer with counsel for plaintiff, that we could get [fol. 489] around this point; I don't know whether I can, but I think I see your Honor's point, that our idea that we need other evidence is not borne out, and that we can probably answer now as well as we can later.

The Presiding Judge: That is exactly what I think.

Mr. Page: I still think that the Court is asking us to make some sacrifice in the matter.

The Presiding Judge: I don't want any sacrifices for me or for the Court, because I am not interested in it; I am going to decide it that way; I am just trying to see if you and I can get a point where you know your associates will agree with you, and I know my associates will agree with me. We will go on if we can.

Mr. Moody: May I say one word in connection with that matter?

The Presiding Judge: Yes, sir.

Mr. Moody: Here is an additional point that suggests itself to my mind in connection with this proposed amendment; we don't know, or at least, I don't know, what testimony the plaintiff expects to offer under this amendment; I don't know what view the Court will take of it, but assuming he will offer testimony upon which the Court will find that there is an effort being made to enforce House Bill 26 or House Bill 25, he alleges that Act unconstitutional; I state frankly, I don't think I am prepared, nor do I think any of my associates are prepared to defend the [fol. 490] constitutionality of House Bill 25. And this further proposition that I would like to suggest to the Court, since I am sure the Court is going to consider this matter, and that is, that there is not only a question of whether the three judge court has jurisdiction to pass upon the case presented by plaintiffs' amended bill, but there is some question of whether or not the United States District Court of the Eastern District of Texas has jurisdiction of the case presented by the plaintiffs' amended bill, that is, as to whether or not it is a suit that arises under the Constitution and laws of the United States. There is no diversity of citizenship in the case now, and whether or not he alleges, of course, that there has been a violation of the Fourteenth Amendment to the Constitution of the United States, but as I understand the opinions of the courts, the application and operation of the Fourteenth Amendment to the Constitution of the United States has some well defined restrictions and there is certainly a question, I think, from his amended bill, whether he alleges any case of which either the District Court for the Eastern District of Texas has jurisdiction over the case whatever. He alleges no

executive board order, and no statute is unconstitutional, as I understand, and it may be simply a suit between two citizens of this state under his original bill.

The Presiding Judge: Why aren't those matters which [fol. 491] will be determined in the argument, either orally or as supplemented by briefs as to what the law is? The only thing we are confronted with now is whether, if their present bill is not sufficient to raise the point they are now trying to make more definite, they should be allowed to make that point more definite, they should be allowed to make that point more clear so that at this hearing this matter could be presented and determined, instead of trying to start the thing by another proceeding.

Mr. Moody: I am not attempting any delay; I think the amendment changes entirely the plaintiffs' cause of action.

The Presiding Judge: If Mr. Page's idea of a conference will do you any good, all right. Do you want to stand on the law of it?

Mr. Moody: No, sir, we will have the conference, but I want to suggest this additional idea about the jurisdiction of the Court.

Mr. Bailey: In view of the conference will your Honor permit me to state in open Court what the evidence was, so they will know how to meet it?

The Presiding Judge: Yes, I think that should be done.

Mr. Bailey: That will require a statement without an argument, if the Court will permit me, and that is that the power of the Governor is to call out the troops for the purpose of enforcing the law, and the purpose of sup- [fol. 492] pressing insurrection. I suppose they will take that position. Now, our idea was that he called it out to enforce the law, and we contended that the law he attempted to enforce was unconstitutional. Provided they have not already seen it, the evidence is in this case that that is exactly what he has been attempting to do. On Page 25 of the bill is the Order of the commanding General which quotes the proclamation of the Governor issued on the 13th day of October, in which he says there is an open rebellion against the efforts of the constituted civil authorities of this state to enforce such orders, and the conservation laws of this state. Therefore, "I command you to enforce them" is the natural consequence.

Now, I made the statement at that time that that was our position about the matter. I introduced that in evidence to show that that was the attempt at that time. If they deny it, or if they introduce any evidence which might go towards proving that fact, the only evidence we could possibly use would be the deposition of the Governor of this State in that connection.

The Presiding Judge: You have no additional evidence other than you have already offered on that point or can offer from his deposition?

Mr. Bailey: From his deposition, absolutely none, sir.

The Presiding Judge: The Court will take a ten minute [fol. 493] recess.

(After Recess)

The Presiding Judge: Does the defense wish to make any statement before we proceed?

Mr. Page: No statement, if your Honor please.

The Presiding Judge: The Court is of the opinion that if the pleading does not sufficiently raise it already, which we have not taken the time to determine, that the only possible surprise that you could have, in view of the counsel's announcement that he does not intend to offer any more evidence than he has got, is that you might be surprised on the law, and you can argue that on your brief, and we will permit the amendment to be filed.

Mr. Page: Note our exception.

The Presiding Judge: All right.

Mr. Moody: Shall we proceed with the testimony, your Honor?

The Presiding Judge: Yes. Mr. Moody, I notice an affidavit put on our desk. I will just direct the stenographer to file it.

Mr. Moody: Yes, sir.

(The affidavit referred to was marked "Respondent's, Attorney General of Texas, Exhibit No. 10, and is as follows:

RESPONDENT'S EXHIBIT No. 10.

STATE OF TEXAS,
County of Travis:

[fol. 494] Before me, the undersigned authority, on this day personally appeared James V. Allred, Attorney Gen-

eral of Texas, and who, being by me first duly sworn, deposes and says as follows, to-wit:

That he was present at a conference in Governor Ross S. Sterling's office on the morning of September 1, 1931, together with the Governor, Honorable C. V. Terrell and Honorable Lon A. Smith, members of the Railroad Commission, and Assistant Attorney General Fred Upchurch. That, at the time of said conference, the Railroad Commission was then considering the promulgation of a proration or conservation order for the East Texas district, composed of Upshur, Gregg, Rusk and Smith Counties. That this conference was called by the Governor. That someone in the conference, other than affiant, incidentally mentioned that the Magnolia Petroleum Company was the only company that had a posted price for crude petroleum oil at that time in said district.

Affiant further says that he did not, in said conference nor on any other occasion, state to the Governor nor any other person that, unless the other purchasing companies posted similar prices for crude petroleum oil to the one then posted by the Magnolia Petroleum Company, he would file suit against them and drive them out of Texas, or words to that effect, nor did he make any statement that was susceptible of such construction.

[fol. 495] Further affiant sayeth not.

(Signed) James V. Allred, James V. Allred, Attorney General of Texas.

Sworn to and subscribed before me this the second day of January, A. D. 1932. (Signed) T. P. Walker, Notary Public in and for Travis County, Texas.

[fol. 496] J. R. Pearson was thereupon called as a witness on behalf of the respondents and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Moody:

My name is J. R. Pearson. I live in Corsicana, but I am in Tyler a great deal. I have business in the East

Texas Oil Field and have been in there since December, 1930.

I was familiar in August, 1931, with conditions as they existed in the East Texas Oil Field with reference to the attitude of the people there with reference to threatening riot, breach of the peace, destruction of property, and violence of one kind and another towards persons and property. I was a member of a committee selected there to see the Governor of Texas, the other members being William G. Johnson, Al Guiberson, and W. E. McKinney, the committee having been selected at a mass meeting at Tyler, Texas, on Tuesday, I believe, before the shutdown on Monday. We came to Houston and had a conference with the Governor. We met him about 10 o'clock that morning and explained to him the conditions in that field and how the field was being damaged and robbed, and how our properties were being damaged, and how the royalty owners and land owners were being treated, and that the people were in such position of mind they simply could not stand it any more and they were not going to stand it any more, [fol. 497] and we came down to explain to him the imminent danger that was going to happen up there immediately if something wasn't done to shut down that field, of dynamiting and blowing up the properties and turning wells loose down the creek. For instance, a man sitting there producing 170 barrels a day and a man sitting off to the side of him producing 20,000 barrels a day, they simply were not going to stand that any more. We told the Governor that there were people up there who were threatening to dynamite property and set fire to property up there, because that was a fact and that was the talk, and it was going to happen immediately, and that thing resulted in our metting there and trying to do something to prevent that proposition. We met up there to see if we couldn't get this thing shut down or stopped some way to prevent this damage. These threats of violence were very largely the things that prompted the calling of that meeting in Tyler. We told the Governor exactly the conditions up there in the field, and we told him the state of mind of the land owners and the lease owners and royalty owners, and the conditions that brought about this state of mind. The people there had just got to the point they just couldn't stand any more, and we wanted the Governor

to come in and shut that field down because of this damage that was talked about, and because of the amount of oil that was produced, because of the damage to the field and the loss to the people who owned the field.

At the time we came down to Houston before we came [fol. 498] to see the Governor I had personally heard men make threats of violence against other people or their property. I am familiar with the attitude of mind of the people in the field at this time with reference to whether or not the lifting of martial law, or the permitting of that field to flow oil without any restrictions. My opinion is that the attitude of the people up there is that they would not allow it, they would try to stop it, they would go to these properties if they tried to open up and they would shut them down. I believe there would be acts of violence against the property of the people if the field were opened up and permitted to run without restriction.

Cross-examination.

By Mr. Nickels:

I have lived in the military district since December, 1930. My home at Corsicana is just about 50 or 60 miles from the nearest edge of the military district. I am a royalty owner and oil producer.

I presume some of the royalties in the lands in the military district have been sold. I don't know how far it has reached out, or what percentage has been sold.

I am interested in the old Dick Wells lease. I don't know whether that royalty is largely held by people residing clear away from the military district. I don't own any of the royalty. We have signed a division order on it. [fol. 499] We are operating the property. We do not necessarily have to know who the royalty owners are. I recall when I signed the division order there were some royalty owners on there, but the number or where they lived I don't remember. I myself own some royalties. I do not know what proportion of the royalty Mr. Wells still retains in the Wells lease. I own about 13 or probably 15 pieces of royalty in the field. For example, on the Mayfield, on the west side of the field, 574 acres. On that particular tract I have seen a list of people who own the

balance of the royalty. I remember something about it. I think there were probably about four or five royalty owners. I think the Mayfield people retained half or maybe three-quarters of the royalty. That might be a rather unusually large amount of royalty to be retained by the land owners. Mr. McKinney lives in Tyler, Texas. He did not come there about the time I did; he has been there about three years. Mr. Guiberson was in Dallas.

I would not say that most of the people I have talked to and from whom I have drawn my conclusions as to the state of mind and intents of those people have been my immediate associates in the oil-producing or royalty-holding business.

With reference to my having heard men make threats, at a meeting one night Mr. Cowden, whose initial I think is A., made a statement, but he did not say "violence." [fol. 500] He lives at Tyler and his business is oil producer.

Mr. Phair, a land owner over there, has told me that if it got to the point where it seemed to have gotten to, he was not going to stand for Sinclair opening up his wells against him as he had done before, where they were producing 170 barrels and Sinclair was producing 5,000 or 10,000, and he was going to do everything in his power to shut them down. I saw Mr. Phair this morning. I don't know whether he is in the court-room or not.

Mr. Cowden, the gentleman I mentioned a while ago, said he was going to turn his oil down the creek; he was not going to let the people next door steal his oil and he couldn't run his oil. They were running their oil and he couldn't run his and he was going to turn his oil down the creek, and he wanted me to do the same thing.

I don't know that I heard anyone use the word "violence" in referring to this military district; I might have heard the word "dynamiting."

I was at a meeting one night and some men wanted to raise the money to get dynamite to go out and blow up a line. That meeting was in the Blackstone Hotel, I think, and was prior to the shutdown probably three or four days. I remember Mr. Ditz Bennett was in the meeting. He is a royalty owner. I believe he lives in Tyler. He has been

there some two years, a year or two, anyhow. In that [fol. 501] meeting a group of five or six men were talking. I do not recall now that anyone in that meeting said he was going to use violence. This gentleman I have named did not say he was going to use violence.

The Presiding Judge: Violence is not important; dynamiting is a violent act. Did he say he was going to blow somebody up?

The Witness: No, he stated in this meeting that there was a group of men that wanted him to get the dynamite. They were going to do it and they wanted him to get the dynamite to blow up the line. He didn't say he was going to do it. He said they wanted him to get the dynamite. I don't know whether he said who this group of men were who wanted him to get the dynamite. The majority of the men that I have talked to have stated that in case this field opened up they were going to shut down the opposing properties that opened up against them, that they were law-abiding citizens and proposed to try to follow the law, and that they did not intend to have their property damaged by these people opening up against them. I recall one man, but he did not say "violence." He said he was not going to allow them to open up against him if it took arms to go over there and shut them down. His name is Earl Calloway. He is a royalty owner and a producer, I think, also. I don't know where he came from, but he has been there about a year, I presume.

That was just common talk amongst dozens, hundreds, [fol. 502] of men, I would say, land owners and royalty owners over there, that they simply were not going to stand for them proceeding like they were proceeding over there. I do not think that I could recall the use of the word "violence," but their intent was plain, what they expected to do.

I was at that Tyler meeting to which I referred.

I heard one of those petitions read yesterday. I do not remember if those things were arranged for at that meeting. I did not see any of the petitions at that meeting, nor immediately after the meeting. I signed one of them.

It is not a fact that the burden of the complaint at the Tyler meeting throughout this district, so far as I heard it, was directed at the price of oil. I don't know which

petition I signed. I think there were two passed around. I think the petition I signed was the one with reference to the danger in the field, and wanting to shut down the field because of insurrection and riot. Whether it had price in it or not I do not remember.

I have not seen any armed bodies of men in that district opposing the authorities, nor any actual act or form of insurrection.

The Presiding Judge: Let me make a suggestion here; there is no dispute upon the point that the courts are open; this very Court is open, and the State Court has been testified to be open, and I think there is no use to go into [fol. 503] that because that is taken for granted; you know they are open.

Mr. Nickels: Yes, I beg the Court's pardon. I believe that is all.

Redirect examination.

By Mr. Moody:

The result or danger of turning oil out on the creek or on the land from an oil well in that country is this: The oil over there is very volatile, subject to fire quicker probably than most any field I have ever been in in Texas; oil going down the creek and somebody throwing a match near it, or an automobile crossing it, the backfire from the automobile, gas rising so fast off this oil that it would set it afire almost instantly, and it would fire up that creek a mile or two or three miles. At Kilgore a few days ago somebody turned some oil out and it fired the creek for three-quarters of a mile, and several people lost their lives over there.

Examination by the Court:

I am living in the territory and have been there since last December, 1930. I was there when the proration orders commenced last spring when the Commission first got its orders out limiting that field, about April, 1931. I have [fol. 504] been there during all the time that there has been an effort made to regulate or control that production and was there before it commenced. I was there when the field was just one well, or, for practical purposes, the

field was just three wells, one on the south end, one on the north end at Kilgore, and one away up eight miles, at Longview. Considerable development did not commence until 1931. I would say the big development came in the last five and a half months of 1931.

Q. Then you are familiar with the efforts and views and discussions that have been made to regulate the output of the field, and the laws that have been passed and rules that have been made with reference to it, are you not, in a general way?

A. Well, in a general way, I remember they had an order back there in April; I don't remember the amount of the oil for the field, the total barrelage, anything of that kind.

Q. Not in particular, but you do know there was some effort to regulate the takings in fixing the allowables, and it is that that you are talking about when you say some of the people said they were obeying the law, and the man across the creek from them or across the way was not obeying them, he was running his wells wide open and this other man was sticking to the allowable fixed by the Commission. Is that what you had in mind?

[fol. 505] A. That was part of it, yes.

Q. That condition actually made people very resentful that the law was being unevenly enforced, some men were attempting to comply with it and some companies and some were not; that was the situation there, wasn't it?

A. Well, that wasn't the situation, your Honor, the first six months of 1931; that situation started in about July 15th, as I remember it.

Q. Then there was no trouble then or no——

A. (Interrupting.) They got these injunctions out and so forth, and just run wide open.

Q. You mean after the Court here decided the Macmillan case in July?

A. I don't remember anything about that case.

Q. In July, you fix it sometime in July, these troubles?

A. Multiplied, began to get stouter and stronger.

Q. Before July there wasn't any trouble, as you remember, any serious excitement—I don't know, I am just trying to ask you.

A. Yes, yes; well, not near as much of this underground talk and threats and so forth as when the field started

about 400,000 barrels and went right up until she got a million two hundred thousand.

Q. What was there about the 400,000 barrels that caused trouble, getting above 400,000; was that the figure that had been set by the producers?

[fol. 506] A. No, that figure was set here on the result of the hearing in August as to the shutdown.

Q. I thought you said it was in July when it got above 400,000?

A. If I remember right, the field was making probably three to three hundred and fifty thousand barrels, not quite that much.

Q. You didn't know anything about 400,000? There wasn't anything in your mind about 400,000 being the amount that the field ought to produce?

A. Not prior to the hearing in August.

Q. Not prior to the hearing in August. Well, then, what was the thing that you wanted the Governor to do when you went up there and asked him to declare martial law?

A. We went up there and told him the condition and told him that the field should be shut down to stop this insurrection and riot and killing of people which was going to happen, and we went the very next day and they tried to get us to come down here by aeroplane right out of that meeting that day; so we drove down that night and we told the Governor that in our opinion, if he didn't shut that field down——

Q. (Interrupting.) Shut it absolutely?

A. Yes, sir, shut that field down absolutely, that he would have to come in there and shut it down to protect the property of these people that were running wide open.

Q. All right. Now, then, at that time the danger and apprehension was that somebody was going to wreck the [fol. 507] property of the other people, but you didn't tell him who was going to do this dynamiting so he could arrest them, did you?

A. No, I don't think we mentioned any specific names to him.

Q. You didn't offer to help him to arrest the dynamiters and suppress those who were breaking the peace?

A. I don't believe I did; I asked him—I thought he ought to shut the field down because of the danger up there, and

the ruination to the people there and the land owners and the field.

Q. Isn't that the real thing that you felt hat if the oil was allowed to run wide open it would hurt the field and injure property; wasn't that what you had in mind more than that you thought there would be danger?

A. No, I don't think so. I had that in mind, however.

Q. You really had no particular interest in shutting the field down; you just wanted to prevent danger and damage to these people who were acting so badly; you were going up there to protect them?

A. That is my reason in the matter, yes, sir, because I knew, Judge, your Honor, I knew what this feeling was; you could feel it, you could just cut it with a knife. You never saw anything like this; if you had been up there and saw what was going on——

Q. Now, when that was going on——

A. (Interrupting.) You know when a man sits there [fol. 508] and is producing 170 barrels a day, and another fellow sitting next to him producing 20,000 and 30,000, and turning it in and taking it off, and laughing at you, and you have probably got no oil at all, well, they just got to the point they couldn't stand it any more and wouldn't be responsible for what they would do, and that was the position the land owners and royalty owners and lease owners were in.

Q. That was the position you were in; you were going to do the violence along with the others, weren't you?

A. I don't know what I was going to do.

Q. The ones that intended——

A. (Interrupting.) I felt intense.

Q. I see.

A. I felt intense, but I am a law-abiding citizen; I told groups of men that the thing to do was to come down here and see the Governor and present the facts to him and see if he wouldn't shut that field down, that I believed the Governor was an honest man and a man that would do the right thing, and we prevailed on several of them to do that thing, and so they wanted us to come down here post haste to see what would be done; a good many of them thought he wouldn't do anything.

Q. Now, then, with the fact in mind that you and the others were about to break the law and take it into your own hands, you came down there and told the Governor [fol. 509] that unless he did what you wanted, you all were going to create an insurrection. Is that right?

A. No, I didn't tell him we were going to do it; I told him what was certainly going to happen up there in that field in our opinion.

Q. Unless he did what the violators of the law demanded, that people's property be closed up without their will or consent, that you are going to have violence, and he said, "All right, I will do what these lawbreakers want me to do, and I will close the field." Did he say that to you?

A. No, he didn't say that at all to us.

Q. What did he say?

A. He listened to our talk which lasted about 45 minutes, and at the end of 45 minutes, why, he told us to come back at 2 o'clock, and it seems——

Q. Well, I don't mean about that, but as to declaring martial law, what did he say when he said he would declare it? What was he declaring it for? To keep the oil from running out on the ground, or to let you all to what you wanted to do, or prevent somebody, or what was the idea that you all were talking about there that day when you wanted martial law?

A. We didn't know anything about that he was going to declare martial law when we come back at 2 o'clock——

Q. What did you ask him for, martial law?

A. We asked him for martial law.

Q. And he didn't tell you at any time that he was going [fol. 510] to declare martial law because he was afraid he couldn't control the field, or because he was afraid he couldn't control the oil, or what was the reason he gave? Did he give any reason to you at all?

A. He didn't give us any reason at all, as I remember.

Q. All right. That is the answer to that. Now, isn't the real thing that you all went up there for, not that you all were lawbreakers and were going to destroy the field and damage everybody, but that you felt that these other persons who were disobeying the orders of the commission were the lawbreakers, and that the Governor ought to take charge of that field while these men were violating the

orders of the Commission, and compel them to obey them? Isn't that what you all went up there for?

A. We knew that the field——

Q. (Interrupting.) Just answer my question. You can't answer it?

A. No.

Q. You didn't care for the Governor to make these other people obey the law?

A. We didn't believe he could do it.

Q. You thought the Governor of the State was powerless to enforce the law, so you told him just to do what? What was the idea that he was to do then; if he could not enforce the law, what was he to do?

[fol. 511] A. We figured—I figured, I don't know what the rest of them did, but I figured the thing to do was to shut that field down and prevent the damage to the people in the field, and prevent the fire and dynamiting that would no doubt be there, and prevent the damage to the field.

Q. I see. Now, for how long was this shutdown to be, according to your petition, forever?

A. No, we had nothing in the petition about that.

Q. Well, in your request—close it indefinitely?

A. We didn't state that in there; we figured that the thing would blow over before long, and these people, these hogs would learn something and get some sense and line up and be right down there, and try to go along in a decent, humane manner.

Q. What hogs? The ones that were going to blow up the plants?

A. No, they were not the ones that were going to blow up the plants. Most of these people that I am talking about were the ones that were running all the oil they could get out from under your lands.

Q. So the only hogs were the ones that were running oil out from under the land, and not ones that were going to blow it up?

A. No, that was in one sense, this feeling.

Q. What I am trying to get, what was the—what was he going to close the field down for, what purpose?

A. To close the field down so it would not be dynamited [fol. 512] and blown up.

Q. I understand, but for what time?

A. We didn't ask for any time at all.

Q. You just wanted him to close the field down and leave it indefinite as to when he opened it up again?

A. That is it.

Q. You just went up there to the Governor and said, "The laws of the State are incapable of being enforced, and we think you ought to take charge of that field and operate it." Is that it?

A. No, we didn't put it to him in that language; we just simply recited, as I have recited heretofore, what the conditions were, and what was very apt to happen immediately if the thing wasn't shut down.

Q. And you made no request of the Governor to operate the field, your committee?

A. To operate the field?

Q. Yes, sir.

A. No, sir.

Q. You never have asked the Governor to undertake to fix the allowables or operate the field, your committee?

A. Well, there was no allowable in the field at that time discussed.

Q. I know. I said you never made any request to the Governor to take charge of that field and keep the produc-
[fol. 513] tion down to a certain point?

A. I have lately.

Q. Oh, you have?

A. Since the field opened up again.

Q. Oh, you have. So you had another meeting with him afterwards?

A. No, I phoned him once or twice on the telephone.

Q. Did you phone him when he opened the field?

A. No.

Q. And when he shut it down?

A. No.

Q. He didn't ask your permission on that?

A. He didn't ask my permission on anything.

Q. When the Commission made laws and its rules and you started operating under the Commission, was the violence still going on? After the wells were opened and they started operating under the order of September 3rd, was everything peaceful out there?

A. Well, I should say that there was such a great wonderful feeling of relief that a man didn't take his life in his hands when he went out in that field and went around those

wells, and the danger of a well being blown up, or meeting a bunch of oil coming down the creek, or one thing and another, that I felt, and I think the majority of people felt that there was a big weight lifted off of them, that is, the whole neighborhood.

[fol. 514] Q. Now, you had the same feeling of peace when the Commission was operating the field in September, didn't you?

A. Well, that was after the—let's see, we opened that field, I think we opened it September 5th.

Q. Yes, and the operating went along perfectly peaceful and nobody was dynamiting or threatening to dynamite was there?

A. I did not hear that after that.

Q. After that. Now, when did they start dynamiting again?

A. I know of no actual dynamiting, your Honor.

Q. When did they start threatening to dynamite again?

A. When the field got up to 425,000 or 430,000 barrels of oil, why, it was very much talked then amongst the land owners and one thing and another, unrest about the field going to open up and get away again.

Q. Now, were they going to blow it up when it got away again, or what were they going to do when it got away again?

A. I would say they were going to start it when it got away again.

Q. So the land owners and the royalty owners have determined among themselves how much oil that field is going to produce, and those that don't agree with them have got to act accordingly, or they will blow them up; is that it?

A. Well, the land owners, about 50 or 75 of them, came down to that August hearing——

Q. Just answer the question. Is that what you say the [fol. 515] feeling is? If a person in that field doesn't agree that 400,000 is all that is going to come out, they are going to blow him up?

A. I think they feel it should be stopped because a man is irreparably damaged.

Q. I understand; you get that 400,000 from somewhere; where do you get that idea?

A. The testimony mostly of the experts down there at the meeting, and the Commission decided on the 400,000 as

the probable amount of oil the field might be able to make.

Q. The real situation in that field is that you and others who occupy the position of owners have fixed a point in your mind either because the Commission did, or somebody swore to it, that persons in that field would only be allowed to operate their pro rata part of 400,000 barrels, and if it goes more than that you are going to dynamite. Is that the way it is?

A. Well, I won't say I am going to dynamite, no.

Q. Well, I mean the rest of them are going to dynamite. Of course, you aren't.

A. I know that there is intense feeling on the matter over there if that field is opened up; that is about all I can tell you.

Q. The Court is just trying to find out what the situation is.

A. Yes.

[fol. 516] Q. And I would like to know what you think about it; of course, you are one of the men that brought it on; you brought the martial law on. Is that the situation? That 400,000 must be maintained there at the peril of dynamiting and arson and incendiarism and trouble. Is that the situation that these other people confront?

A. I wouldn't say from that standpoint, no.

Q. Suppose you let it run a few barrels over 400,000; would you dynamite?

A. It ran up to 425,000 barrels.

Q. You got that high without dynamiting. If it went to 450,000 would there be dynamiting?

A. I don't know.

Q. How high do you think it could run before they started dynamiting?

A. Well, I don't know that, either.

Q. You don't know?

A. No.

Q. Then you heard the General testify that if it got over 400,000 there was going to be trouble. Is that your opinion, too?

A. I think there will probably be trouble, yes; I will say if the field is opened up or any particular class of wells opened up.

Q. You heard the General say that they might be edu-

[fol. 517] cated to stand a little more. Do you believe that?

He said the people might be educated up to four or five or six hundred thousand. Do you think they could be educated up that high?

A. I don't think so, no.

Q. I see.

A. No.

Q. You think the education stops at 450,000?

A. Well, I just have my own personal——

Q. (Interrupting.) I know; that is what I am trying to find out.

A. Yes.

Q. Because that is put in the case as one of the elements of the case, that the people have got this fixed idea, and as one of the people, I suppose you are one of them that they are talking about.

A. Yes.

Q. I want to find out whether there is, through the field, this idea that if the state or anybody else permits that field to produce over 400,000 barrels, there is going to be insurrection and riot.

A. I don't know whether there will be or not.

Q. Now, in October, you knew that the military took the matter out of the hands of the Commission again, didn't you? Did you know of that?

A. Yes, when the injunction suit was granted.

[fol. 518] Q. Yes. Was that on your advice?

A. No.

Q. Or your petition?

A. No.

Q. At that time you didn't know of any threatened insurrection, did you?

A. Well, I know the intense feeling that night when it became known.

Q. When what became known?

A. About this injunction.

Q. Then the real insurrection is against the injunction?

A. The feeling against Murchison.

Q. Who is Murchison?

A. He is the Brock-Lee Oil Company.

Q. Well, the cause of the present insurrection is the granting of the injunction?

A. I don't know whether it is or not.

Q. Well, I mean in your opinion; is it your opinion that that caused them to insurrect again?

A. Well, the people were very much incensed that anybody would want to open up their wells in the field against the way it was being handled by the Commission.

Q. Were they incensed at anybody but Murchison?

A. Well, they looked at him as the chief instigator.

Q. Well, I understand, but besides Murchison was there [fol. 519] anybody else that was in the way of their impending wrath? Who else was in danger besides Murchison, of being dynamited and destroyed. Who was going to be dynamited and destroyed when the General took the field again?

A. Well, I don't know specifically; I heard complaints about——

Q. (Interrupting.) How many; were there several or just two or three?

A. Well, I heard lots of people talking about Murchison.

Q. Oh, no; I mean were there several recalcitrants or were there only one or two? I believe I haven't made myself clear. How many people were acting contrary to the will of the people there at that time besides Murchison, and that the people then felt angered against?

A. Well, the defendants that brought this suit, the parties, whoever they were.

Q. Well, besides those, were there anybody else acting there?

A. I think they were all following the rules laid down.

Q. I see.

A. Including these people, too.

Q. These were the only persons that the resentment was against. Is that right?

A. Well, I think the resentment would be against anybody that——

Q. (Interrupting.) I know, sir; I mean at that time was there anybody else that they were mad at except these peo- [fol. 520] ple that got the injunction.

A. Not that I remember of.

Q. Not that you remember of. Now, do you think that there were not troops enough in the field to have protected the properties of these men from the wrath of the people, without taking the whole field over, enough sheriffs or constables to have gone down to the property of these plaintiffs

and protected it if they were the only source of trouble? Could not they have been protected?

A. Well, there were a lot of violators; there had been violators before, and if these people were permitted to open up the rest of them would open up, and that would be scattered from one end of the field to the other, about 40 miles long, and it would be a big job to take care of it.

Q. The idea was that if these people got an injunction the others would open up?

A. Yes, sir, the people told me there were other people with injunctions already written up, about 15 of them.

Q. There wasn't any idea that anybody was going to open up their well unless they could do so by getting an injunction; wasn't that it?

A. I don't know how they would have done it; I suppose they were going to open up without an injunction; I suppose they would, myself.

Q. You are stating that to me?

[fol. 521] A. I am telling you the information around there; I didn't go out and interrogate these people and find out individually what each one was going to do; it was just general talk; it come like a blow of thunder when this injunction was granted because the thing was going along all right and the people were satisfied, and this come like a clap of thunder to them, and they were shocked, so to speak.

Q. The idea was, if people were allowed to resort to the courts to test out their rights in that field, that that would raise an insurrection and violence immediately?

A. Well, I don't know; you may put it that way.

Q. I am just asking you whether that is correct; I am not putting a thing.

A. I didn't think about it in that light.

Q. Then you thought about it in what light? This new violence which caused the march in October, did you see the new violence that caused the General to occupy the field again in a military way?

A. Well, he was there all the time. I never knew him to go.

Q. He didn't change at all as far as you know?

A. I don't know it, no.

Q. Well, he testified to the fact here that he ceased operating for the Commission and called the Governor, and

upon the Governor's orders—his suggestion that it ought [fol. 522] to be done, as I understand his testimony, that he told the Governor that he and the Governor better take charge again or otherwise there would be trouble. Now, at that time that he and the Governor took charge again and ousted the Commission, that has been testified to by deposition, also, what was the violence going on then, outside of the Brock-Lee injunction suit? Who was acting violently? Do you know?

A. No, I don't know.

Q. That is all.

WILLIAM G. JOHNSON was thereupon called as a witness on behalf of the respondents and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Moody:

My name is William G. Johnson. I live at Tyler, Texas, and have lived there a year and three days. I was one of a committee selected at a meeting at Tyler directed to call on the Governor of Texas in regard to conditions in the East Texas Oil Field. I served as a member of that committee and called on the Governor in pursuance to the directions we received from this meeting. We met the Governor in the City of Houston. Messrs. Pearson, Guiberson, and McKinney were with me. I want to reiterate what Mr. Pearson has testified to, as the Committee spoke as a whole. [fol. 523] Then I want to add to that what I told the Governor about my personal case.

I was offset on three sides, or offset by three wells that were running wide open, and I was running 170 barrels on each of those leases, and I told the Governor my royalty owners were just raising particular Hell, and we had to do something. This party was running 20,000 barrels, and I was only allowed to run about 500 out of the three wells, and that the royalty owners and the other interested parties with me were demanding that this party should not steal our oil, and he said, "Why didn't you take it up with the Attorney General?" I said, "I did. I wired the Attorney General and he wired me back they had referred it to the

Railroad Commission. I wired the Railroad Commission and they said, 'We have referred it to the Attorney General.'" And I said, "Governor, you are the last resort." Then I told him about a specific instance; one group came to me and said, "If you will go with us I will stop the blankety blank from stealing my oil." I had two such cases as that. I told him the one case where there was eight or nine wells in on the property and the operating company drilled the eighth or ninth well in. The owner went down with a shotgun and said, "Don't connect up. You have been running my oil and I don't know whether I am going to be accounted for or not."

[fol. 524] Cross-examination.

By Mr. Nickels:

I have never lived in Tulsa since the War. I have lived in Oklahoma City prior to moving to Tyler. I have properties in Oklahoma and Texas. I have been a resident of Texas since the second day of this month a year ago. I rent a residence on Mockingbird Lane in Tyler.

I don't remember the name of this man who came with a shotgun. It was on one of those big tracts in the center of the pool. He did not come and talk to me personally about it. Mr. Thrash, whose lease I am operating, said if certain conditions were not stopped he was going to take his shotgun out. That is Mr. S. E. Thrash, a man about 80 years old. He had two wells offsetting him running wide open. They were draining his oil and we were obeying the law. Our operating company was obeying the laws that were set by the State Legislature. I am not a lawyer and don't know whether that is the law that has been declared unconstitutional. That was just prior to the military shutdown, just prior to the inauguration of martial law. I don't know about this other shotgun incident being just rumor and hearsay; it is the truth, but I cannot tell the name. I did not hear this man say it. I will give this other party's name in a second. This occurred the day of the shutdown in Tyler. He called me out and said, "Is this meeting going to mean anything?" and I said, "I think so," and he said, "Well, if it doesn't, I will get a shotgun [fol. 525] and go down and stop the blankety blank from stealing my oil if I can get eight more men to join me." That was Mr. Delaney, who was down there at that time.

Mr. Thrash lives down there at Tyler on the land right at the little town of London.

Nothing was said to the Governor about the handling of the production of oil of this field. I asked him to take charge of the field to prevent some of the people from being robbed of their oil.

MANUEL T. GONZALES was thereupon called as a witness on behalf of the respondents and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Page:

My name is Manuel T. Gonzales. I am a Sergeant of Texas Rangers going on five years, having entered the service in 1920. I served in situations where martial law has been declared by the Governor of Texas at Mexia, Borger, Dennison, Sherman, and the East Texas Oil Fields. At Galveston and Corpus Christi martial law situations have occurred since I have been on the Rangers in which I was not present. I am now in charge of the East Texas Oil Fields under Captain Hickman and have been there 11 months. I was sent there because they were having an influx of undesirable citizens and quite a bit of criminal ac- [fol. 526] tivities. I am acting under the Governor's orders. My duties there involve gathering information and I report it to General Sterling, the Adjutant General. Within that East Texas Oil Field since I have been there I have traveled 12,500 miles by automobiles and 2,500 miles by horse in 11 months. I have visited the various towns in the district and have been all over the district. I have visited the rigs and I have been out in the brush. I have been there both day and night. In my duties of gathering information I listen in and question and get information in any legal was that I can. I have had experience in the past as to gathering information of violence which might occur or criminal acts; I have been a peace officer. The most effective method I have found along that line is keeping your mouth shut and your ears open. I am fairly well

acquainted with criminals and criminal types generally. I have had experience in dealing with highly excited and desperate men. I have had occasions when ordinarily good and lawabiding citizens became both highly excited and desperate. Based on my experience and my investigation I will say I have found what I call the good people of that district excited. The restriction of oil production out there seems to be all they are worried about. They are apparently satisfied with the production of oil the way it is now, which is somewhere around 400,000 barrels. I do not know how they reached that figure. Based upon that investigation [fol. 527] and information, it is my opinion that if production were permitted to open up beyond its present figure we would have trouble that we would not be able to cope with; we would have fires and dynamiting and probability of killing and destruction of property. We could not prevent those acts because it is too large an area and not sufficient men to cover each well and refinery and pipeline; we would have to do just constantly guard duty and partol duty at the same time. Numerous times I have heard it said that there would be violent interference with production and that wells, pipelines and tank farms would be dynamited. In that event my opinion is that it would not be possible to protect the resident people in that district if that were done, the women and children and the aged and infirm people there, not all of them. I have heard men say that they would open their wells wide and turn the oil down the creek if and wells were permitted to open up. If that happened and the oil caught fire it would burn down the homes and cattle and destroy property and catch other wells and refineries and tanks and cause people to be burned up. There is very much of a criminal element present in that disrict; they are pretty much dissatisfied and are talking and grumbling on the streets. That is both the criminal element and the good citizens. Now since the martial law is in there they are apparently satisfied; lots of working men are grumbling because there is not enough [fol. 528] work and they are kind of excited and apprehensive up there; we have had some trouble. I know something about the presence of firearms in the district. We have seized more firearms there than in any oil field I have ever been in. I do not think we have seized them all. It has been reported to me that explosives such as nitroglycerin,

dynamite and time bonds have been stolen from storage in that field. We have been unable to find them. There have been hundreds of quarts of nitro stolen and I think six bombs. These bombs are like an infernal machine. The ones that were stolen were about that long (indicating) and they are about as round as your fist and they have a clock in them. You put the explosive in the side of them and set the clock at a certain time and it goes off. For instance, 1 to 2 and up to 12 hours, I believe. Those time bombs are used in the oil business.

I am acquainted with what we generally refer to as a Red. They are present in that district, I know, because I arrested them and found cards and literature on them. I am acquainted with the customary tactics of such men when any disorder such as fire or mob violence occurs and they generally take advantage of it.

There have been demonstrations and attempts to destroy property up there and violence by reason of wage disputes. At Longview there was a mob of about 500 in one bunch on the Court-house lawn, and they went down to an office [fol. 529] building there and by that time they had accumulated about 1,000 men and they tore up the office, mashed the front part of it in, and we faced them and gave them a talk to and they made a lot of talk about what they were going to do if certain things did not be done, that they were hungry and they were dissatisfied. They made lots of very bad talk and they were very much dissatisfied. The local officers have all they can do to take care of their civil and criminal work. We help each other; we work together.

I could not say how many arrests I have made up there personally, but on one drive we arrested a thousand in 24 hours; that was the big drive. Our jails are full all the time and we built extra jails. When an arrest is made up there the bystanders will help us sometimes. In one instance there they took a prisoner off a man and the officer had to run to save his life. There were about a hundred people gathered around that officer.

If any serious situation has developed there such as dynamiting or fire the local officers cannot handle it.

I have heard threats against persons who might open up their wells at numerous times. I have heard threats that the property would be fired; they would fire places and dynamite them. I heard some remarks passed that

they ought to take out certain people and hang them. I overheard this at different gatherings and meetings, some were prearranged meetings and some were gossip, talking on the streets in little bunches. I was present at one meet-
[fol. 530] ing where there were about 1500. I was under cover there; I was sent there. I had on a little hat, dressed up in regular clothes, and tried to conceal my identity as much as possible. I was doing intelligence work, undercover work.

In my experience as a peace officer I have had men come up and tell me that they were going to commit acts of violence, but, as a rule, they do not tell me. I have especially guarded property up there at times. I guarded the Brock-Lee well after the injunction immediately after the injunction was granted against the military authority. I guarded it day and night and I had visitors out there at night and I had conversations with them. On the Brock-Lee property that night six men came out in a car and they were openly making threats against the Brock-Lee people and made the remark that they ought to be hung and this and that, and everything was going along all right until they interfered and made some very unusual remarks, threats that the well ought to be burned up and the refinery burned up with it, and things like that. I told them to go on about their business, that everything would be taken care of in the proper way. They went on about their business then. They knew who I was; I told them. They knew I was a Texas Ranger.

The churches in that district were all locked and they broke into the churches and tore up the bibles and prayer books and broke up things generally in there, and destroyed
[fol. 531] the places inside something awful.

The town of Kilgore quit putting inflammable oil on its Main Street because after they poured it on the street it was set afire and they had to stop using it.

The jails there vary; in some instances they are full and some they are not. They are never empty, but are mostly full. There are all the criminal acts we can take care of.

The possibility of violence to which I have referred has not existed ever since August 16th. Before prohoration or before this martial law they had some trouble up there, but then it kind of settled down to normal. There has been a little unrest lately. I made reports to this effect to the

Commanding General of the Military District; I made reports to Colonel Davidson, Provost Marshal, while martial law was in effect. I made reports to General Jacob F. Wolters, Commanding General of the Military Forces, while martial law was in effect. Before that I made my reports to General W. W. Sterling, Adjutant General.

Cross-examination.

By Mr. Nickels:

Since martial law took effect I have been under the immediate command or direction of General Wolters and General Sterling, both. I made reports to General Wolters.

These six men who came to me on the night that I was [fol. 532] guarding the Brock-Lee lease and made these statements about certain people ought to be hung and the wells burned looked to me like farmers. I do not know the names of those particular ones, but I could identify them if I saw them. I don't know where they live. They had a local car number on the car. They were talking, but didn't commit any act. I did not leave the idea that they were threatening to do these things. They were talking what would be done, but they didn't commit an act. They didn't set fire to it or anything. They said it would be done if something wasn't done about this thing, something like that. They didn't say that they would do it.

We do not know who set the fire to the Kilgore street. I didn't mean to leave the idea that that had anything on earth to do with this proration. The only thing is that they set fire to those streets, just deliberately, which is kind of unusual. I do not know who did it.

The breaking into the churches was done by men up there that were just loafing. They stole all the fans and dishes out there and took the Bible and tore it up in pieces; I witnessed that myself. None of them were land owners in those counties or men who were operating oil wells. None of that thousand arrested in the raid I referred to were land owners and operators of oil leases. Participating in that raid we had all the local officers and about ten Rangers. It was a general clean-up; we arrested 59 major [fol. 533] criminals and sent some of them to the penitentiary for life. We immediately made charges against them. A lot of them were fugitives. The others mostly

left on trains or any way to get out of the country. It is against the law for me to order any one out; I cannot do that, but I can arrest them every time they violate the law. I made charges against these other folks, all of them that warranted and the evidence showed that they violated some law and we arrested them. We would arrest 15 or 20 men in a gambling place and the proprietor and a couple more of them we would make a case against; we would file on them and question them, fingerprint them and if they turned up all right and they were working men, we released them. We did not make a charge against every man we arrested. They were just detained for questioning, instead of arresting, we will say. We had them there under force and were questioning them, holding them for investigation. We were acting under our orders in doing such things. When we catch 25 men inside a gambling house the law allows us to arrest them and question them for investigation. We operate under orders according to the law and in the manner which I have just described.

No man in that military district said he was going to use violence under any condition in respect to this oil business. I have heard lots of men say that this oil was their oil, their fathers and mothers and people had been there, just the same as their cattle and home and they were going to protect it regardless of the cost. I have heard lots of men [fol. 534] say that and that they would use arms if necessary. I have heard the Crims say they would use arms, that is Malcolm Crim, and the Lairds, and John Peterson, who lives over in Rusk County, just over the line. He didn't use that language that he was going to use arms. He said it was his place and he was going to protect it and wouldn't let no one take it away from him, wouldn't let no one come there and take something that belonged to him. Regardless of what happened, he was going to protect himself and his property—it belonged to him.

It is sometimes hard to give names. Maybe four or five days before martial law there was a meeting in Tyler and I was under cover in a crowd there and I heard groups of men in a bunch saying things and there were lots of excited talks there, lots of nasty talk. I would know the men if I saw them, but I don't know their names. I don't know what resolutions they adopted at that meeting, but that was the meeting where Senator Pollard got up. I don't

know whether Mr. Pearson was there or not. That was the meeting where Senator Pollard was hooted so much. I cannot name any other man except the Crims that made threats they themselves were going to use any character of violence, but I have heard lots of them talking on the streets. I don't know all their names. I have heard them talk on the streets and say what they would do, that they were going to protect their property and were not going to let anyone have it and they would rise up in arms be- [fol. 535] fore they would let anyone have it. I have given the names of the Lairds, the Roy Laird and the other Laird. I heard several of the Crim boys talking.

Q. And said they would use violence?

The Witness: You keep asking me if they would use violence. They said they would protect their property, regardless of the cost. That is the attitude they took, that they were not going to let anybody run over them. I don't know their names, but I have seen numerous men talking; it is common gossip on the street. As to whether we took any precautions other than what I have described to locate those folks so that in case they did use violence we might have some information I will say we have several men over there that we keep tab on. They are men that are questionable and men whom we watch on fires and things like that. I don't know what contacts they have over there with regard to land owners and oil producers. We are not watching them on account of their connection with the oil industry in the sense of being producers or land owners. All I am interested in is the suppression of crime and violence.

There are three men over there that are Reds. They are the Reds I referred to in response to Mr. Page's questions. We do not have them under arrest, but are just watching them. If anything happened to a well tomorrow or something happened to a pipeline or a big fire there are numerous men I would question among the landowners; I would [fol. 536] want to know where they were. I have mentioned the names of persons of that class. I would want to question these gentlemen I have named. I do not know whether everybody I have mentioned is in the Court House at this time or not.

This stolen nitro and dynamite and one thing and another did not happen long before the military law; it

is not the same incident that Captain Hamer referred to in his interviews; there have been additional ones that I heard of. This nitroglycerine was taken away from the magazine belonging to Blackie DeLong who lost quite a bit of stuff. These time bombs were taken after a place was burglarized in Kilgore. We have had quite a bit of contact with an Oklahoma outfit that lost some stuff right around Longview. There were no others that I recall since martial law. All of those materials are explosives and have legitimate uses in the oil fields. They are used by oil producers. These materials could be stolen and used for legitimate purposes or otherwise; that is something I don't know.

I don't know anything about the oil business. All I know is that I have heard people speak on the streets and they appear to be satisfied that if the field were thrown open there would be trouble. I don't know how much above the present figures would have to be produced before that would happen. What I mean is if the field were thrown open to where it was out of control. These people were apparently satisfied with the amount of oil that was being produced, [fol. 537] but if the field were opened again there would be trouble.

It is not true that a great deal of discontent to which I have referred is due to the fact that development has been stopped to a certain extent and men are thrown out of work through restrictions on the production of oil. I have heard men say that there are more men working now because they have to drill more wells. I have heard lots of them say, "Well, I have got work now since they are drilling more wells."

I am asked whether that thing at Longview that I referred to just lasted a short time, where those folks came in and demanded their pay and the employers claimed their money was tied up and I will say it lasted one week and happened every day. They had a mass meeting on the Court House lawn and then went down and demanded certain things and tore up the place and they had to call the officers out to handle it.

Examination by the Court.

Questions by Judge Bryant:

A large influx of the criminal element is a natural incident to the development of any oil field.

I acted and participated in the administration of martial law at Borger and at Mexia, which were both bad situations. We found evidence of possible violations in each of those areas common to those that we found in the East Texas Field, but those fields were just one little town, [fol. 538] while in the East Texas Field we have four counties to cover. In connection with the administration of martial law in the Mexia, Borger, and Hutchinson County fields we did not in any wise attempt to administer that law at any stage to regulate or have anything to do with the production of oil or gas. This is my first experience; that is my first experience in a field where they have to handle production. If we had considered in relation to either the Borger or the Mexia Fields the management or the control of the production of oil or the amount of oil that flowed out of the ground was a necessary incident to the protection of law and order, we would have assumed that action in those situations, but we were there on an entirely different situation in the other fields. We went up there because local, city, and county officials had openly sold out and were in conspiracy with the criminal element, and we went up there to arrest the officials and put them out of office, which we did in this instance; we did not over here; it is a different situation. The officials over here are working with us night and day. They are honest and conscientious in the performance of their duties, and have been wonderfully faithful in the performance of those duties throughout the time that we have been over there. The circumstances were more aggravated in the situations with which we had to deal in the fields other than the East Texas Field.

Judge Bryant:

[fol. 539] Q. The whole difference is the matter of production, the limitation of production, isn't it?

A. No, up there in Hutchinson County, why, the officials—of course, it was a criminal violation for open gambling houses and whiskey rings and killings and hijackings, and down here it seems to be that the citizens are aggravated by having something taken away from them.

Q. Well, now, I will ask you this question: In connection with your administration of martial law in the fields of Mexia and Borger you made these roundups and numerous

arrests and various activities of that kind which you considered essential to the performance of your duty, didn't you?

A. Yes, sir.

Q. You have taken identically the same action in the East Texas Field, haven't you?

A. Yes, sir.

Q. I will ask you if you have taken any different action of any kind or character in relation to acts of violence or possible acts of violence occurring within the East Texas Fields, different from the acts that you have taken in the other fields, in the course of the administration of martial law there, except to prevent the wells from flowing over a certain amount of oil which has been determined by the Governor's decision in this matter.

A. I don't look after the wells, your Honor, but we have [fol. 540] taken a little—yes, sir, we have gone around among and watched to hold down any violence from the citizens uprising and trying to prepare ourselves for something that apparently is in the wind. Lots of talk, bound to be something in the wind.

Q. Now, what I ask you is this, this is a question which, if you can answer it, say so, and if you can't, say so. Have you ever done any acts or performed any acts different in kind or character from the acts that you performed in the administration of martial law in these other areas I have mentioned, other than to limit the production of the producing wells within that area?

A. No, sir; I don't believe we have.

Q. What is your answer?

A. I don't believe we have, just the suppression of crime and general law enforcement duties, investigating all this talk we hear, keeping posted with it.

Redirect examination.

By Mr. Page:

In none of these other experiences — which we have had martial law was there any dispute about the restriction of oil production, to my knowledge.

From my own knowledge I cannot answer whether the wells are shot under the supervision of the Railroad Commision of Texas.

[fol. 541] I have reported everything I have testified about, from time to time, to Colonel Davidson, General Wolters, and General Sterling.

I was not called upon at Borger or Mexia to deal with a situation where the restriction of oil had gotten into the popular mind. Oil did not come into the subject at all. As to whether the dissatisfaction with the oil production enters into the situation up here today, the general talk on the street among the people is that they were dissatisfied before martial law and they would be dissatisfied if martial — were lifted. That is the attitude they take and it seems to be the topic of conversations.

Colonel Louis S. Davidson was thereupon called as a witness on behalf of the respondents and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Moody:

My name is Colonel Louis S. Davidson. I am at present detailed with the National Guard organization in charge of the enforcement of martial law in Gregg, Upshur, and Rusk Counties as Provost Marshal. I have been in the military zone since August 16, and have served as Provost Marshal during all the time that the territory has been under martial law. In my service in that field I am directly under the orders of the Commanding General Wolters. My duties [fol. 542] involve the assembling of information regarding conditions in the occupied territory. I secure the information from the Rangers and patrols and people that are friendly to us that will pass it on, and from certain undercover men that we have working there. My duties involve imparting that information to General Wolters. I do not necessarily report to anyone else; certain information is given out to the command; that is general information that they may need. From time to time I have imparted to General Wolters the information I have gathered from the sources I have mentioned. The information that I have gathered with reference to the possibility of riot, breaches of the peace and other disorders and violence towards persons

or property in that territory is that if the field were opened to such extent that they were unable to dispose of the oil properly, get rid of it, the little man would give us trouble. We had information that threats were made that they would blow up pipelines and they would not allow the other people to produce and rob them. They seem to have the opinion up there that if they are not able to produce and the others in the field do produce they are robbing them, taking that which is their own.

With regard to whether there are ample facilities for the transportation of the maximum amount of oil that that field might produce I will say that based on the condition when we arrived there when there were 1,600 wells, and there are now 3,600, there was not transportation facility [fol. 543] enough at that time to dispose of the oil and there were lots of them unable to produce because they couldn't get pipeline connections and tank cars to move it. You have to do anything you can and everything you can to maintain peace and keep everybody satisfied. We have complaints every day from people that have brought in a well and can get no connections, nobody to take the oil, and we try to get them connections and serve them in that way to keep them in the proper frame of mind. In the present temper of mind of the people in that field as has been reported to me by these parties I have mentioned, if the field should be opened up so that one man would have a connection or the means of a market for his oil and another one would not, I believe that would bring about acts of violence against persons or property or bring about riots and disorders. I believe the people that had the pipelines would have them blown up. I have so reported to my command officer. If that field with its approximately 3,600 oil wells were allowed to run without any restrictions the production would be more than the capacity of the pipelines and railroads; it was when they had 1,623 wells.

At present there is quite a bit of drilling going on in that territory. I do not know anything specifically about the number of people that are engaged up there in the drilling of oil wells, but I would say that from 3,000 to 5,000 [fol. 544] are engaged in drilling oil wells, producing, hauling, drayage, and all. In the drilling of oil wells I would say 3,000 to 4,000 people. If the present wells in that field were opened up and allowed to flow I believe that would

stop the drilling of wells, because they would have no way to dispose of the oil. That would leave these people that are engaged now in the drilling of oil wells out of employment, and that would leave a fertile field for the destruction of property and riots and so forth, for workers and people without any employment are easily stirred up along those lines. From the information that I have received from these sources I think the restriction of the production of this oil is absolutely necessary as a military measure and also to prevent acts of overt violence towards persons and property. Whenever the production gets up to where the people cannot dispose of it nobody wants to take it and unrest starts again. Concerning the matter just inquired about I wired General Wolters in Austin that there was uneasiness in the field, the people were unable to dispose of their oil, that we would have to have more men up there unless some steps were taken to reduce the oil. I reported that it was necessary to reduce the production or have more men, because if anything started we would have to have more men to control the situation than we have there now. I thought at that time that there was danger of something starting in that event; that is, just at that time, the latter [fol. 545] part of November or the first part of December, we had a couple of tanks that the owners believed were set on fire. We investigated that. We had two or three cases where it was reported an attempt had been made to set fire to a well and we increased the guard over certain properties there that we would hear a rumor that something is going to be done on this property or that.

I have been a commissioned officer in the Texas National Guard, barring the war service, some 28 years. I was in the Army during the War in France, serving as a commander in the 36th Division, Machine Gun Battalion. I have served in martial law enforcements on quite a few occasions in this State, most recently at Galveston, Mexia, Borger, Sherman, and the East Texas Fields. From my knowledge of the field up there and my experience in military matters and in the enforcement of martial law, I consider that it is a matter of military necessity for the preservation of peace and order and the protection of property and the lives of people in the community, that the production of oil be restricted in that field for the present at least, just the same as each time that you are out on martial law

there is a different problem; it may be restricting the sales of hardware store, not allowing them to sell any arms and ammunition. I have seen that situation arise in my experience. We restricted the sales of arms and ammunition at Galveston and at Borger and at Sherman. The first thing you do in any of them, as we did here in this field, [fol. 546] is to try to get the local officers active and the others in the suppression of bootlegging, because whiskey excites people whenever they can get to it, clean up the other vices, and all. As Provost Marshal in that field I report to General Wolters my opinions as I have here stated them to the Court; I make a daily report every day, and have reported these opinions that I have stated here from the witness stand to General Wolters from day to day.

I was present at one conference General Wolters had with the Governor here in Houston the latter part of September, I believe it was. The question was brought up there of reducing the force we had down there and I talked to the Governor about it would be impossible to reduce the present force that we have scattered over that area, and explained to him the different classes of work we were doing up there, and we needed every man we had; we were down to a minimum. I told him that it was absolutely necessary up there to regulate the production of oil to keep those people in a sane frame of mind.

Examination by the Court:

In civil life I am a traveling salesman, representing the Fred Medart Company of St. Louis. I am not a lawyer. I have had experience in the Army such as I have testified to a little over 30 years.

[fol. 547] Q. And in this field your duties as the Provost Marshal require you to furnish the General information as to the state of the mind of the people in that section. Is that what you do?

A. Preserve order, try to anticipate any trouble.

Q. I mean in that way.

A. Yes, sir.

Q. You try to find out what the people are thinking about?

A. Yes, sir.

Q. You try to find out what people are thinking about?

A. Yes, sir, and obviate that.

Q. And when you find out that anybody is going to be violent, you try to do what he wants you to do so he won't be violent?

A. No, sir, try to obviate it; in other words, beat him to it and fix it so he won't, and if he commits any act of violence, arrest him.

Q. Here is what you said, you understood the people were getting excited because the oil maybe was going out too fast and, therefore, you cut it down again to keep them from being excited; is that the way?

A. Judge, if I may say so, the people up there seem to have the opinion that if one man produces and they cannot, —now, I don't know that the volume of oil, I am not an oil man, don't know anything about that effect on it, but they seem to be of the opinion that when it comes to a point where they can not get their oil taken, and the other man [fol. 548] can, that the other man is taking their property.

Q. You heard General Wolters' statement that they have got an idea in their minds that if 400,000 barrels is produced from that field it is all right, and if more than that is produced it is all wrong. Is that the idea you have about it?

A. Quite a few of them have that idea, that there is a limit.

Q. I know, but this thing that makes you all act whenever you find out it is getting beyond 400,000 barrels, you reduce it, is that the way?

A. No, sir, when I find those people talking, if they start blowing up a tank yard or setting fire to some place, the operators say they do, you understand, and you go out and investigate the circumstances, and they are suspicious.

Q. Now, then they start to blow up a tank you reduce the output of oil?

A. No, we go out to see what the trouble is.

Q. Then you find out that somebody is blowing a tank up; then you say, "Let's reduce the allowable for the field?"

A. No, sir.

Q. Then how does the allowable for the field, reducing it from 150 to 100, have anything to do with blowing up a tank? That is what I am trying to get in my mind.

A. These people will never blow up a tank of some little producer; it is always somebody that has got a pipeline connection or something else that they probably think pre-
[fol. 549] vents them from having it.

Q. You must misunderstand me; the point of this whole case seems to me to be, it may not be,—but in order to prevent insurrection out there you all have to keep those gauges fixed so that they may never rise above the public pulse, and the public pulse is fixed at 400,000 barrels, and when the field is running a little more than that then the public gets excited. Is that the way you figure it?

A. In a way, for this reason, that when you get above that figure the people begin to complain that they have got a tank full of oil, they can not produce any more, and they cannot get rid of it.

Q. That is fixed at 400,000, never changes?

A. Oh, it fluctuates up and down; it has been as much as 455,000 since we have been there.

Q. And now it is down to about 340,000?

A. I think it is around 380,000.

Q. Do you know why that last order—did I understand you to tell Mr. Moody that that last reduction was put in at your suggestion?

A. I said that if they did not see fit to reduce it, that I asked for an increase in force.

Q. Now, how did you know that you got it low enough?

A. I don't know that we have it low enough.

Q. Then maybe you had better lower it; there may be trouble up there yet; I mean, how do you know what allow-
[fol. 550] able is going to satisfy them?

A. It seems to satisfy them, Judge, whenever they can dispose of all the oil that they produce up there, and every-body alike.

Q. That is the point. It doesn't make any difference how many barrels if you get a good price and dispose of all the oil in the field. You could get a million a day and nobody be dissatisfied, and nobody would be dissatisfied. Isn't that right?

A. I don't know.

Q. Well, you have been having ideas on the other points; haven't you any on that?

A. I don't know what the field could produce, what effect it would have, or anything about it.

Q. I know, but the only thing that is bothering the people there is that they want a market for their oil and if they can get a market for their oil. it doesn't make any difference whether it is 400,000 or what it is. Is that the point?

A. I don't know how they feel on it, but up to 400,000 they have been getting all that they have produced taken.

Q. You have been a business man, you have been in business and have been in the army; what has this 400,000 idea got to do with it, as Provost Marshal of that field?

A. It doesn't have any effect on me at all.

Q. I know, but in your mind as Provost Marshal, what [fol. 551] effect has that on the insurrection.

A. It seems that those people have an opinion up there that when you get more than, we will say 400,000, for the figures, that they are not getting the oil and being able to dispose of it.

Q. Now, which people think that?

A. I am talking about—that is the information you get from every corner up there, the little men will begin coming in to you there and saying, "We cannot dispose of our oil."

Q. Because it is more than 400,000, or is there some understanding amongst the bigger companies that when it gets more than 400,000 they won't take it?

A. Not that I know of.

Q. That is what I mean, the little ones come in and tell you it is getting above 400,000 now, and we cannot dispose of it; is that because the bigger companies have issued those orders that they won't buy it when it gets above 400,000?

A. No, sir; I don't know if they have issued any orders; I have not heard of any such order.

Q. Why is it that the little men come in to you when the production runs over 400,000, and tell you they cannot get rid of the oil, do you know?

A. No, sir, I don't.

Q. Then you don't know anything about the relation which the General says exists between 400,000 and peace?

A. No, personally, no; but the people up there give you [fol. 552] the impression that that is the limit that they can produce up there.

Q. And they don't give you enough information for you to determine why they reached that conclusion?

A. No, sir; I haven't gone into that phase of it at all.

Q. Well, now, at the time that the Commission was operating the field in October, you were still Provost Marshal?

A. Yes, sir.

Q. Well, was it you that advised the General to take the field away from the Commission after the injunction, or did he just advise himself on that?

A. I was not present; I was in Dallas for two days when that happened.

Q. You don't know anything about the insurrection that took place then?

A. No, I was called home and reported back on the 14th.

Q. You never have known of any of the conditions that caused the Commission to disappear and the Governor to reappear?

A. No; I increased the guard on the properties of the people that had the injunction in order to protect their properties.

Q. Yes. Did you hear any reports, as Provost Marshal, get any information that because the injunction had issued the people were going to insurrect?

A. No, Judge, they said that they were not going to stand for these people to produce; the question of whether [fol. 553] the injunction was issued or not did not enter into it.

Q. Now, when was that that they said they were not going to stand for it?

A. Oh, that was when I got back there on the 14th.

Q. That was after the General had taken charge of the field for the Governor?

A. Yes, sir.

Q. And you quit acting for the Commission?

A. Yes, sir.

Q. Did he advise you that you were no longer acting for the Commission?

A. He handed me a copy of the order he issued which stated that he was acting directly under the Governor.

Q. Now, as Provost Marshal, it is your duty to see—supervise the conditions and generally supervise the business; the General does not do this personal supervision himself? He looks to you, doesn't he?

A. Yes.

Q. So the orders that have been made from time to time by the General or the Governor—who makes these orders reducing the allowable, the Governor or the General?

A. The Governor.

Q. Now, who tells him when it is time to reduce, you or the General?

A. I don't tell him; we just simply compile the information; I gather the information and don't make any recom-
[fol. 554] mendations on it as to production or anything like that; I make recommendations as to what I think would remedy a certain case or if you take up some certain matters.

Q. Have you got any of your reports which were made to the Governor as a basis for reducing the allowable from 165 to — is that where the Commission left it?

Mr. Moody: One hundred eight-five.

The Court:

Q. From 185, the Commission's orders down to this present 100; do you know how the Governor got down there, and who got him down? Was it your recommendation?

A. No, sir.

Q. You don't know anything about how he got down to 100 barrels?

A. I didn't make any recommendations on how he come down at all; I furnished information that was gathered in the field of conditions.

Q. Did you furnish any information which had to do with these successive reductions of the allowable from 185 to 100?

A. Judge, that came down by small steps, 185, 165, 150, 125 and on down.

Q. What makes it come down that way, do you know?

A. Trying to maintain the allowable there.

Q. What allowable?

A. Of around 400,000.

[fol. 555] Q. So 400,000 really is like the General said, the magic figure in the field, is it?

A. It is in the field the figure those people accept.

Q. All right.

The Witness: If the production in the field rises above that quantity which the people believe can be produced

without injuring the field or rises above that quantity that can be produced, and all producers have their avenues of outlet for their oil, if it goes above that figure, the likelihood of disturbances and riots and attempts to destroy property multiplies as the conditions increase there.

Cross-examination.

By Mr. Nickels:

From hearsay I understand the pipeline capacity of that military district is somewhere around 600,000 barrels. It was reported at one time to be a million two hundred thousand, but that was when they were using the tank cars and everything else. I don't know whether the pipeline capacity itself is something in excess of 800,000 barrels, but it is, I think, at least 600,000 barrels. At the time of martial law the railroads were transporting some several hundred thousand barrels in tank cars. There is some tank-car movement yet, I should say, but that is nothing; it is very small compared with what it was. I understand that [fol. 556] at the time martial law went into effect the pipelines and the railroad tank service were handling something like a million barrels a day; so that, if the production were increased say 400,000 barrels over what it is now, there would be plenty of outlet for the oil, so far as transportation facilities are concerned, physical facilities. The gist of these complaints, however, is not the price that results from the marketing of say 800,000 barrels as against 400,000; when you get up there there are people bringing in new wells and nobody wants them; they don't want to connect them. We have about 15 right now that are asking for relief on connections and so forth. There has been a check made of that field as to how many wells are not connected at this time; they have data on that in the office there. I don't know what that is; it does not come under my department at all. There are over 2,000 more wells there now than there were before martial law, but I don't know how many were without connection before or how many are now. As to whether or not all through martial law there have been numerous wells that have never had connections, I will say there have been numerous times that they have stated they have not. We have always been able to get somebody to connect to them so far. In every instance in the course of a week or so we have

been able to get them a connection except when the weather was such that they couldn't get in there. I don't know [fol. 557] whether it is a fact or not that the records show that at this time and for weeks past there have been over a hundred wells without any connections at all; I don't handle any of that part of it at all. There was a meeting there about a week or ten days ago on that very subject. The General called a conference there of the pipeline people to get them to form a committee to make connections to take the distressed oil. While there have been at all times wells without any connections at all, there has not as a result of that actually resulted any acts of violence, so far as I know, except the burning here and there of a well.

The first incident of burning when we got there was churches and houses in Kilgore. Since then there have been numerous fires, some small and some large. We have had two wells burn in the Lathrop area, one right recently and one before this. We have had breaks in the pipe lines. The testimony is to the effect that when the last well burned somebody was seen to strike a match and throw it in the oil, and we haven't finished our investigation yet. That was about two weeks ago. Nobody has been caught, although lots of suspicious characters have been questioned but none held. There was another fire up there some two and a half months ago. I don't know the name of the well. That is not the one that caught on fire one Sunday and burned Paul [fol. 558] Vitex, not any of those that the people were killed. There were no casualties in the burning of these two. I do not know anything about what caused that fire or any other particular fires that I had in mind that I meant to refer to in my testimony, except where a pipe line would break and the oil got set on fire. I don't know whether that frequently happens in all oil fields. I am not competent to say on that.

I was at Mexia and Borger. We did not have a pipe line break at either of those places while I was there. I would have paid attention to those things if they had occurred; I was out over the field. In the East Texas Field I would say that eight or ten instances of that have been reported. I cannot give an estimate now as to the mileage of lines in that field.

There was one storage tank fired at Overton and I believe three at Gladewater.

I could not begin to name every instance of fires since August 16th when martial law began.

I remember one or two fires down there before I went down; one was a coal fire, I think.

Those wells had been shut down completely until they had made up what they produced over the allowable. I was away at the time on the 13th and when I got back the wells had been shut down. As Provost Marshal I am responsible for the safety of the district up there, to see that nothing happens, the enforcement of the laws, to take such [fol. 559] steps as are necessary to obviate such trouble. We have had nothing comparable to a court of inquiry sitting on civil rights up there in my administration; we have had a board of investigations, that is all. As to whether there have been any arrests made under military law, I will say the arrests are all made by the Rangers. There have been no arrests made of any supposed offenders against the conservation law; there have been people requested to come in and testify, and sent for. We do not dispose of any of those matters about property rights and this and that. We gather such evidence as is necessary. If there is anything there to show of any statutes violated, anything like that, that is turned over to the civil authorities. What we have investigated there on violations during the time the Railroad Commission was there, those cases have been made up and turned over to the Railroad Commission for transmission to the Attorney General. There was one case completed. I was not a member of the Board and did not see the findings after that was completed, but there was one complete case and several that they were working on at the time, I believe.

I don't know Mr. Burton, who operates a well in that territory or is interested in the operation of one, that I know of, but I know there is such a man up there. I do not recall that there is any order requiring him to shut down his well recently; there may be.

Since I have been there in that district I have not heard [fol. 560] a single, solitary man say or make threats that he himself was going to use violence. They will tell you that somebody else is going to do it.

In the event some producer in the East Texas Field has exceeded his allowable the orders of the military commander are that they take that man's records and he comes in and

they check them over and if he has over produced they cut him back until he has absorbed that. They do not shut him down entirely; sometimes he makes it up by reducing it 25 or 40 barrels a day. They do not attempt to arrest him and never have attempted to arrest anybody.

W. W. STERLING was thereupon called as a witness on behalf of the respondents and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Moody:

My name is W. W. Sterling. I am at present Adjutant General of the State of Texas. Prior to the inception of martial law in the East Texas Oil Field I had Rangers working under me in the oil field. Part of the time Captain Hickman was up there and made reports to me as to the condition of law enforcement in that field, but most of the time Sergeant Gonzaulas was there, the same man that testified here this morning. He made reports to me from time to time as to the condition with reference to law en- [fol. 561] forcement in the East Texas Oil Field. I have those reports in my office in Austin. I transmitted them to Governor Sterling. Since martial law has been in effect up there I have been in the oil fields myself on several occasions, not permanently. Since martial law has been in effect Sergeant Gonzaulas has reported to me on the condition of law enforcement and the temper and mind of the people up there. He makes a weekly report and in addition to that reports anything that he thinks needs reporting. The information I have so secured I have transmitted to the Governor. I told him that there was grave danger up there and unless pretty active steps were taken to curb it, it would break out. I advised with him in advance of the declaration of martial law and counseled with him that martial law was the only way to hold the situation down up there. I have counseled with him in connection with the orders that he has issued from time to time respecting the production of oil up there. I have advised him that each one of those orders that he has made from time to time was neces-

sary to preserve the peace up there. I have so stated on numerous occasions to the Governor.

Before this East Texas Oil Field I was stationed in Borger as a Ranger, but not under martial law. Martial law was not there at the time I was there. I was there a long time in advance of martial law. I was not in any other place where martial law was being enforced. I lived in the [fol. 562] Breckenridge and Ranger Oil Fields. I have had lots of experience in law enforcement in all oil fields, but not under martial law. I was Justice of the Peace in Miranda City. I have been in the law enforcement business 21 years, which includes being Captain in the Ranger force, Adjutant General, Deputy Sheriff, and Justice of the Peace. I never was a Sheriff. It also includes Government scout and two or three things like that. I was an officer in the suppression of disturbances on the Mexican Border a good number of years ago, employed by the United States Government. Now I am Adjutant General of the State, and I certify to the correctness of the orders of the Governor as they are issued from his office, his military orders, or my office does. In my judgment the orders which the Governor has made with reference to the East Texas Oil Fields have been dictated by matter of military necessity in order to preserve the peace in that field. I believe that the restriction of the production of oil in that field is necessary to the preservation of the peace. By that I just mean that it seems to be sort of like a sick patient on a diet, that seems to be the diet that they thrive on over there, that seems to be what keeps down disorder of all sorts, and I am for it.

I have never conspired with anyone in the oil business that I ever heard of to control the production of oil over there. As Adjutant General of this State and the officer in the enforcement of the law and the administration of [fol. 563] martial law over there I am not in the least concerned in the price of oil or in the quantity of oil produced except in so far as it may affect the peace and quiet of the community.

Examination by the Court:

Q. You say as the military advisor of the Governor you think the reduction of the production of oil down to 100 barrels is necessary to preserve the peace?

A. I don't know about the reduction, your Honor. I understood—of course, I know about that, but I mean I didn't advise him in that way; I understood that as the number of drilling wells increases the allowable had to come down.

Q. Why, Mr. Sterling?

A. Well, there was 1600 wells, I believe, when we took charge over there, and there are now 3600, something like that. Naturally they would have to be distributed among more people, more wells.

Q. Why is that?

A. Well, I am unable to say that, except the more wells they would have to be reduced to keep it in the limit.

Q. That is it; what is the limit?

A. Well, it seems to be 400,000 barrels.

Q. Now, you are a military commander and you have got that limit. What made you get it?

A. Well, it just seems as I tried to use the homely expres-
[fol. 564] sion, that seems to be the diet the patient thrives on over there.

Q. Are you the doctor that prescribed that for him?

A. No, I had nothing to do with prescribing it.

Q. Who prescribed that dose for the patient?

A. I don't know, Judge, who did.

Q. You used that simile of prescribing that dose for the patient?

A. I mean diet.

Q. Well, diet; who is the doctor that prescribed that diet?

A. Well, I don't know.

Q. You didn't?

A. No, sir.

Q. Now, suppose you have got something on your hands that you have to administer for the balance of your life.

A. I hope not.

Q. Why haven't you?

A. Well, I think those things usually work themselves out. You know, when a man gets a war on his hands it gets over sometime.

Q. How are you going to end that war over there?

A. I don't know, those things usually work themselves out; I let them work themselves out.

Q. You couldn't let them work themselves out. What work are you doing about it? How are you going to settle

[fol. 565] it if you are going to have to keep somebody there to regulate that production, always keep those fellows under suppression because they are going to insurrect, what are you ever going to do?

A. We hope they will come to their senses and regulate themselves. That is my hope; that is not official; that is just my private opinion.

Q. I am talking to you as commander of the field, you didn't prescribe the 400,000, but you got the idea that as every well comes in you have got to reduce the allowable so as to keep the allowable within 400,000, that is your idea?

A. That seems the fixed opinion.

Q. You don't know where they got it? The plaintiff says from the Petroleum Institute and from the Governor of Oklahoma and other places.

A. I imagine it came from the law of supply and demand.

Q. Well, I believe you are a better judge than any we have had; so you think the law of supply and demand fixes it?

A. That is what I think; I may be a mile wrong.

Q. Well, I think that is correct; I believe I will agree with you on that. Now, what is going to be done with that? You can't repeal the law of supply and demand, can you?

A. No, sir; I cannot.

Q. You cannot suppress it by a military invasion, can you?

A. I never heard of it being done.

[fol. 566] Q. Now, what are you going to do with that field that you have got on your hands, with the law of supply and demand operating, and you have got to reduce the supply according to the wells?

A. I am going to follow the Governor's orders.

Q. Well, now, that is really the fact. They put you on the stand to testify that you are telling the Governor; the Governor is telling you, isn't he?

A. No, I pass my information to him. In Texas the Adjutant General is just like the Chief of Staff in the American Army.

Q. You don't tell him what to do at all?

A. We advise with each other; yes, sir.

Q. You didn't advise with him about the 400,000?

A. No, I didn't do that.

Q. Well, now, I saw in the paper at the time, in October,

at the time when General Wolters ceased working for the Commission and commenced working for the Governor, running the field out there, a statement from Austin that Governor Sterling—I don't know whether it said you, Sterling, or Governor Sterling, had made the statement, one of them, that it was necessary to take the Commission out of the field and turn it back to General Wolters so that the courts could not come in, because the courts could not do anything with the Governor. Did you make that statement?

A. No, sir, I was in Washington at school at that time.

[fol. 567] Q. You didn't see that statement and don't know who authorized that statement?

A. No, sir.

Q. That was in one of the papers and you didn't authorize it?

A. I have been absent all the fall; I was in Washington all fall.

Q. All right that is all.

J. W. FITZGERALD was thereupon called as a witness on behalf of the respondents and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Moody:

My name is J. W. Fitzgerald. I live in Tyler and am connected at this time with the Citizens National Bank. For many years I was a lawyer.

In my contact with people who live in and work in the oil field area up there in East Texas I have heard quite a lot of expressions concerning the possibility or lack of possibility of riots and revolt in case the production in the East Texas Oil Field is thrown open. I heard that mostly in the bank. The oil field is about 22 to 35 miles east of us, the north end being 23 or 24 miles and the south end about 35 miles. It runs there in a half moon shape, 5 to 8 miles wide, and about that distance from Tyler. It runs through the southeastern part of our county and many oil men live in [fol. 568] our town and come there and visit with us among the other banks of the town, and, naturally, as a citizen of

Tyler, I try to keep posted on the situation. I have talked to people who live in and work in the oil fields out there. In my opinion, from what I have heard from these people, there is very much danger of acts of violence towards persons and property and the destruction of property or attempted destruction of property, if restrictions are lifted and the oil field is permitted to run without restriction.

Cross-examination.

By Mr. Nickels:

I have not heard any talk like that except hearsay and rumor; I haven't been out in the oil fields personally and come in contact with the folks out yonder.

I have heard so many say that they themselves were going to use violence that I never taxed my mind with it. I have heard them say that they were going to protect their property, and if the law wouldn't do it, they were going to do it, but they didn't say what they were going to do. I thought I knew what they meant. Seriously, I wouldn't pay much attention to a man who told me that he was going to kill me. R. W. Phair is one man who said that, and he was in my Sunday School class 25 years and is a good, law-abiding man, and the Mayor of Overton, the last few days; he said he was going to protect his property. I didn't ask him if he was going to use violence and I have not heard him [fol. 569] say he was going to. As to whether I have heard any man say that or whether it was always somebody else was going to use violence, I will say I think I have seen enough of the world in 65 years to size folks up in talking with them. I have heard them say, "I am going to protect my property if the law won't do it for me."

I have not had occasion up there to observe the general form of the leases used in that territory. I quit practicing law some years ago. I think this form Producers 88 Revised is in more or less general use in that territory.

Examination by the Court:

Q. I would like to ask the gentleman a question. What is it that they are going to protect themselves against?

A. Judge, these people feel that that oil is a common pool.

Q. Yes, I understand that they feel that that oil is a common pool.

A. A common pool, and the man who is drilling by my farm that I have lived on fifty years, maybe, and I haven't got a well drilled yet, but that man is robbing me, and if the State won't protect me, I will protect myself.

Q. All right. Now, how is that going to be brought about? How are they going to get the State to protect them? What is it they want to do? What do they want up there?

A. He wants to be protected.

Q. I mean in what way.

[fol. 570] A. In draining his oil out from under his land.

Q. He doesn't want to let anybody drill on land adjoining until he gets ready. Is that it?

A. Well, maybe he cannot drill; maybe somebody has got his land leased that won't drill.

Q. He just says, "I am going to fix this law myself; that man can't drill on land adjoining me until I get ready." Is that what he says?

A. No.

Q. What does he say?

A. This man says—this man wants to run 5,000 or 10,000 barrels of oil, and I cannot run but a hundred barrels of oil, and he is robbing me, stealing my oil; stealing my oil; stealing my oil.

Q. All right. He is stealing his oil because he cannot run but a hundred barrels of oil; what is to prevent him from running more than a hundred barrels of oil?

A. The law, the military orders.

Q. The military order is stopping them from running, and that is what they are complaining of?

A. Well, in one sense, yes. Judge, from my standpoint, permit me—pardon me——

Q. Yes.

A. You don't understand the immensity of that oil field, I don't think. It is about 42 miles long and 7 or 8 miles wide; some of them will run 30,000 barrels a day if it is [fol. 571] turned loose.

Q. What is it they want? I have been up in East Texas all my life, and my father before me; I never saw any wild people up there; this evidence shows you have all gone wild.

A. No, lots of folks are perfectly cool. The lamented Judge Bryant, his father (indicating Judge Bryant), he and I were in his court and it came to us as they were going to start down to the jail, a mob of men; we went down quickly

and the thing got away from us. We had to stand and watch. That is the thing we are trying to hold back. I am proud of our country. I live there, don't own a dollar's worth of stock in oil lands.

Q. What is the thing they want done? Do they want 400,000 barrels a day?

A. They want fair play.

Q. They want fair play? Do they want a million barrels a day or what?

A. For instance, the Sinclair came in there——

Q. (Interrupting.) Leaving out the Sinclair and Gulf and all these others, good and bad, the testimony here is, if you don't give these people 400,000 barrels a day they are going to erupt; if you give them more than 400,000 barrels a day they are going to erupt.

A. Lots of them I talked to believe that when you run a million barrels from the field you destroy the field.

Q. A million barrels?

[fol. 572] A. Or anything in excess——

Q. (Interrupting.) In excess of what?

A. In other words, they figured out 400,000 is probably all right, they won't get salt water.

Q. Who has done that?

A. I don't know where it came from, Judge; there is a lot of people there——

Q. (Interrupting.) You are like the rest of them, four hundred thousand is the thing?

A. No, I am telling you what is in our peoples' minds, Judge.

Q. Sir?

A. They have been educated some way.

Q. To 400,000 barrels?

A. That that is a pretty safe yield so far as waste is concerned, and destruction is concerned; as long as that is run, why, they won't get salt water; but make the wells turn loose and they will get salt water.

Q. That is the thing, and if you do more than that people are going to insurrect?

A. Danger of it in my opinion.

Q. All right, danger of it.

A. Danger of it in my opinion. To illustrate the condition, we have as good a sheriff's force in our country as I know of in the State of Texas. Luke Turner, he is our chief

[fol. 573] deputy sheriff and has been for years. They cannot handle our local situation; it takes all their time. It takes all their time and then they cannot hold down our local situation and we in Tyler——

Q. (Interrupting.) On account of bootleggers?

A. Bootleggers and criminals of all kinds, hijackers, stealing cars, holding people up on the street at night, turn your head aside and they will rob you, we have had two district courts working for six weeks trying to hold it down.

Q. Your local people cannot hold that down?

A. I know they cannot control the situation.

Q. Judge Bryant says, suppose the military decides these wells were causing trouble and the best thing was to just shut the whole field down, what would the people do then?

A. Well, they shut it down about three weeks and they finally composed it pretty good, and they are satisfied now.

Q. You think the people want the field shut down?

A. Sir?

Q. You think the people want the field shut down?

A. I don't think they want it shut down permanently; I think most of our people in Tyler would prefer it to being hijacked and robbed and stolen from and killed.

Redirect examination.

By Mr. Moody:

There is a general feeling that the unrestricted produc-[fol. 574] tion of oil up there would leave some people with facilities to run their oil and others would not have them.

Governor Sterling was in Tyler and made a trip to the oil field about three or four weeks ago or five weeks ago. He came to Tyler the second day to a luncheon, and after luncheon I went to him and shook hands with him and merely in a minute I said, "Governor, conditions are bad yet; I urge you to keep your military force in charge."

Recross-examination.

By Mr. Bailey:

I do not agree with General Sterling primarily that it is the market condition that has anything to do with this

amount of oil that is produced; I do incidentally only. I think that law and order is the real point. Incidentally, the market conditions may affect the people's state of mind. I know that if more than 400,000 barrels is produced, it will reduce the price of oil. Turn the field loose and I expect it would be a cent a gallon, or a half cent, or you couldn't sell it at all. As to whether that is what the people in East Texas are trying to avoid, they are trying to avoid anarchy.

Mr. Moody: What the people in East Texas are trying to avoid is immaterial. It is what the Governor——

The Presiding Judge (interrupting): I thing the whole argument has been based upon the minds of the people of [fol. 575] East Texas.

Mr. Moody: As brought home to the Governor who made the order.

The Presiding Judge: Oh, is that it? Well, I will overrule the objection because you have been going into so much on that composite East Texas mind that I think we had better finish up with it.

Mr. Moody: Note our exception. May it please the Court, as we have limited the witnesses, we have other witnesses that we would tender on substantially the same facts, but we don't care to place them on the stand unless the Court wishes us to place them on. We would like to have a five-minute recess, if the Court please, for consultation.

Hon. Ross S. Sterling, one of the respondents herein, was thereupon called as a witness and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

I am R. S. Sterling, Governor of the State of Texas, and was on and immediately prior to August 16, 1931.

I recall a committee composed of Messrs. Pearson, Johnson, and others from Tyler calling upon me in Houston. They reported to me that conditions were very bad in East Texas, that there was grave danger of lawlessness

[fol. 576] and trouble, that the people were ready to take the law into their own hands if something wasn't done in the East Texas Oil Field to prevent it. I believed that report.

Prior to the time I declared martial law I received numerous letters and telephone calls and personal calls as to the conditions in the East Texas Oil Fields, which matters are covered very largely in my deposition. On or about August 16, 1931, I issued a written proclamation declaring martial law in this military district. I did not prepare that proclamaton; I had the assistance of the Attorney General's Department and General Wolters was present when it was drawn. I explained to those gentlemen my purpose in declaring martial law. I stated to those gentlemen who actually prepared the language that is used in the proclamation the general condition that was existing there as represented to me from various sources, which is plainly set out in the proclamation. I believed at that time that there was an insurrection or imminent danger of an insurrection in these four counties. That was my purpose in declaring martial law. At that time the Legislature had passed a conservation law, proration law, which had the effect of repealing the former law and it was left where they were unable to enforce any proration or regulation in that field and the field was wide open, so to speak, and producing something like 1,400,000 barrels a day at that time. When I sent General Wolters and the military forces into these four counties pursuant to this [fol. 577] proclamation of martial law I instructed General Wolters to shut down all of the wells in order to preserve the peace and to keep them shut down until the regulatory bodies could have some law on which to handle the situation. The Railroad Commission of Texas is the regulatory body which under our law has the power and authority to fix proration orders, and that body thereafter fixed the amount of oil that could be produced from each well in this military district. I think the order was put into effect on September 5. I believe it was issued on September 3 and made effective September 5. I understood that they were going to issue an order and that it was to be put on the well basis, so much per well. I asked

for a conference with the Railroad Commission, told them that I thought it would be better for them to use the same method that was used before, that is, the potential amount of the field, or on an acreage basis, in a way that would prevent so much drilling of wells. As a matter of fact, the so-called open docket was written in the order before I asked for a conference with the Railroad Commission. It is my understanding that that so-called open docket clause was in the order originally, and at this conference I think it was Chairman Terrell, of the Commission, had said that this open docket provision was there and that they could change the amount from time to time without the necessity of holding another hearing. After this order of the Railroad Commission fixing proration at 225 barrels per [fol. 578] day the instruction to General Wolters was that he was to assist in carrying out the order of the Railroad Commission. He was to assist in enforcing that law. There was a great insistence that if the military forces would be withdrawn they would have the same condition again, they would have danger of trouble in the oil field. Thereafter my recollection is that the Railroad Commission reduced the allowable from 225 to 200 and from 200 to 185 and from 185 to 165 barrels. The 165-barrel-per-well order was in effect on October 13th. In regard to these subsequent orders of the Railroad Commission of 200, 185, and 165 barrels, I gave General Wolters orders to assist in carrying out and enforcing this law, the same orders as I gave before in regard to it.

The first information I had of this suit being filed in the United States District Court was when I was called by telephone by Mr. Guiberson, I think, of Dallas, telling me that he had information that the oil field was going to be turned wide open and wanted to know about it. I told him there was nothing to it, that that was not the case. He said people were very much excited in East Texas and they were very much excited in Dallas about the rumor. So I phoned General Wolters and asked him about it and he knew nothing of it at the time, but later on phoned me that the Tyler papers were carrying an article that there was going to be or had been issued an injunction against the Railroad Commission and the Attorney General from enforcing the proration law against certain wells in the

[fol. 579] East Texas Oil Field. He told me, I think, to use his exact language, that "Hell would be apopping," if those wells were opened up, and I would have to send him more troops in order to keep order over there in that field. Then I told him he could obey the orders of the Governor and keep the wells shut down or to the allowable that had been placed by the Railroad Commission; that as long as the Governor was not enjoined the Governor's orders certainly could not be enjoined and we would try and hold the situation through my orders. I was not at that time a defendant in this suit; I was made a defendant in the amended petition.

With regard to what some newspaper in Austin may have reported as to any statement I made, I will say there have been many statements made by the newspapers, but whatever statement I have made I never made any statement to reflect on this Court. If there was any implied statement or anything like that, it certainly was not an intentional statement to reflect on the Courts of the United States or of the State. It was entirely foreign to my thought; I had no idea of reflecting on the Court.

The Presiding Judge: Have you in mind the question I asked?

Mr. Smith: Yes, sir.

The Presiding Judge: It wasn't a matter of reflection; it was a matter of policy; that question, I was going to [fol. 580] ask him, you can ask him whether he didn't make that statement that as his orders could not be reviewed by the Courts he would take charge of the matter and prevent the Court from entering, not that it was a matter of respect, but a matter of power.

Mr. Smith: I see. Did you make a statement that you would take charge and prevent the Courts from interfering?

The Presiding Judge: Not that, the statment was — prevent the Courts from interfering with the operation of that field because orders of the Governor were above the interference by the Court:

The Witness: I don't think I made any statement, Judge, to say that I would prevent the Courts from doing anything in that language.

Questions by the Court:

Q. The statement attributed to you, I asked you, I will ask you again, that since you had been advised—I don't think the paper stated whether it was the Governor of Oklahoma or what, I am not sure, but you had been advised by somebody that the orders of the Governor could not be reviewed by anybody but the Supreme Court of the United States and no Court could inquire into what you were doing as Governor, that you would take that field over so as to save the situation if the Commission was enjoined and that you were taking it over in order to keep the Court injunction from being issued against those in [fol. 581] charge of the field. That statement was attributed to you. Was that statement made by you?

A. I don't think I made any such statement in that way, Judge; of course, there are lots of statements that get into the newspapers.

Q. Yes, sir, I know; I have suffered from it, too.

A. You have suffered from it, too, as much as I have, perhaps not as much as I have suffered in the last year.

Q. I am not trying to get it as a matter of reflection, but as to the purpose of that order, what did you state the purpose of the order? Because upon the theory of law which you thought justified in acting on that the order of the Governor in charge of the situation in military occupation would prevent the Court from granting an injunction that you would take it away from the Commission and take charge of it yourself? That is the question I asked.

A. Well, I never made any statement about taking anything away from the Commission. I may have made a statement that I was not enjoined and that my orders could be carried out without fear of injunction of the Court, maybe something like that, but as to reflection on any member of your Honorable Court that would be far from me.

Q. I know it would be from that idea at all, but just the question of your judgment as to your power.

A. And as to taking advice, I might say this: As to being advised by the Governor of Oklahoma, why, I think [fol. 582] the people of Texas know that I don't take advice from the Governor of Oklahoma.

Q. I say that is what the papers say, but the question I wanted to get at was your purpose in issuing that order, was it because you felt that you could not be reached through that military operation?

A. The purpose in issuing that order, if your Honor please, was to keep peace and order in that oil field in East Texas and prevent something from happening that I possibly would and everybody else would regret, had it not been done.

Q. And you were under the impression that your orders could not be reviewed by court action because of there being military operations and were not subject to review and for that reason you took the field back again, was that the idea?

A. I said nothing about taking the field back again. As a matter of fact, the order was not to supplant the Railroad Commission, but, of course, as soon as I did issue this order, why, the Railroad Commission dropped out of the picture, so to speak, and the military forces have had to carry on.

Q. That is the question I had in mind, not the question of disrespect or anything at all.

Mr. Smith: If your Honor will pardon me, whether it is correct or not, I did read in the newspaper the statement that you have there as coming from Governor Murray of Oklahoma. Now, whether Governor Murray made the statement, I don't know. I remember reading that; I think [fol. 583] you have confused our Governor with Governor Murray of Oklahoma.

The Presiding Judge: Maybe I did that.

The Witness: I don't want the Court to get confused with the Governor of Texas and the Governor of Oklahoma, because we don't agree all the time.

Direct examination (cont'd).

By Mr. Smith:

Subsequent to October 13th I received further and additional reports from Generals Wolters and Sterling and other sources in regard to the situation in East Texas. I myself made a personal tour of that field. I directed and

commanded General Wolters to enforce the three subsequent orders, the effect of which being to reduce production, primarily for the purpose of keeping peace and order in the district, and I might say further that during the time or a day or so after I had asked the conference with the Railroad Commission in reference to them passing an order whereby they could take hold of the situation in East Texas; there was a flood of phone messages and telegrams protesting against the thought of releasing martial law from that area, that there would be trouble if that was done. In the last three or four weeks I have invited the Railroad Commission to meet with me in my office for the purpose of ascertaining whether or not they could not make and enter a valid order at this time, after giving due notice of hearing and all that sort of thing, by which the civil authorities could again take charge of that field so [fol. 584] far as the control of the production is concerned.

Market demand and the price of oil and that sort of thing has not entered into my mind nor has it been my purpose in declaring and in enforcing martial law in East Texas. As a matter of fact, I think the people of Texas, and particularly the oil people, will know, as Governor, that I sent a message to the Legislature in which I stated that I would not look with favor upon any bill which was passed by them, if it carried anything in it that looked like price fixing or market demand. There was a real effort made to cause the conservation law that was enacted to carry this price fixing feature, and the law that was enacted did not carry it. As to whether or not if it had carried I would have vetoed it, I will say they understood it that way.

It is absolutely not a fact that the Humble Company, the Texas Company, General Wolters, and I entered into a conspiracy to hold down the production of oil. Nor is it a fact that I am indebted to the Humble Oil Company from 400,000 to 1,000,000 dollars. It is my prime and you might say sole object in declaring martial law and in continuing to maintain it to maintain law and order, preserve the peace, and uphold the majesty of the law in the East Texas Oil Field; though, as Governor of Texas, I will say, which it was plainly stated in the proclamation, naturally I am interested in the revenue that is coming to the State and the conservation of the natural resources of the State. That

[fol. 585] consideration, however, is secondary, and the prime consideration was to preserve the peace and order, the observance of the law. On the many and several and various representations made to me in regard to conditions with reference to the possibility of violations in this East Texas Oil Field from before I first declared martial law down to this date I acted in good faith in the acts I have taken and the honest belief that it was necessary. I was sure it was absolutely necessary. If I had not believed it was absolutely necessary, I would not have declared martial law. There had been quite an insistence that it should be done long before it was done. I think that my friends know that I am not so anxious to declare martial law or anything else, for it brings on a great deal work on the part of the Executive, because he has got work enough without being the Commander-in-Chief of the Military Forces over the State.

Cross-examination.

By Mr. Bailey:

The open docket clause in the first order of the Railroad Commission was put in there before my conference with them.

I gave my deposition in this case and in that deposition I made the following statements: "I asked, if I remember right, for a conference with the Railroad Commission and I told them I thought it would be better to place it on an acreage [fol. 586] basis in place of a well basis, the amount of oil to be from the whole field, and not from wells, that it be handled in the way that it had been previously handled by the Railroad Commission—that is, the amount for the field or per pool, and to be adjusted in the way it had previously been adjusted, more on an acreage basis than a per-well basis. The Railroad Commission did not agree to do that, but as a result of the conference they placed it at 225 barrels per well. They made the order tentative so it could be changed at any time without further hearings. They put the open-docket clause in that." I think I received that circular letter from the Railroad Commission dated May 19, 1931, and referred to in my deposition on page 149. That was sent out. Quite a few people received that letter.

(The letter identified by the witness is as follows:)

"A message from the Railroad Commission of Texas to Governor R. S. Sterling Suggesting immediate Action relative to Conservation of Oil and Gas.

May 19, 1931.

Hon. Ross S. Sterling, Executive Office, Capitol, Austin, Texas.

DEAR SIR: The Railroad Commission after extended hearings has from time to time issued orders designed to [fol. 587] prevent the waste of oil and gas in Texas; they have been generally observed and have resulted in preventing great waste. Recently many suits have been filed contesting the orders especially as to the East Texas fields. During the pendency of these suits no penalties can be collected for violations of such orders and the operators are producing as they please. It will take months before the Supreme Court can decide the legal questions involved.

The testimony at the various public hearings showed beyond question that unequal withdrawals and unrestricted flow, especially in flush areas, cause a great loss of oil and gas and the recovery of oil will be about one-half what it could be under proper operating conditions. Such waste should be prevented, for the time will soon come when our oil and gas reserves will be greatly depleted or exhausted. The price will be prohibitive and if no cheap substitute is available, the calamity will be too serious to contemplate.

Under present laws and conditions the Commission cannot promptly enforce its orders. It appears that the laws could well be strengthened. We are also handicapped by lack of funds. The pipe line law was enacted two years ago, but without any appropriation giving us power to enforce it. A petroleum engineer is needed and funds should be provided so that the State may pay the umpires and other employees needed in the fields. At present such funds are raised by voluntary subscriptions paid by the operators in the field.

[fol. 588] The Commission hesitates to make specific recommendations as to what legislation is needed, but it is obvious that it cannot properly or promptly enforce its orders under present laws and without funds available and

consequently the waste of oil and gas in this State is enormous.

Believing a crisis has arisen in the field of oil production and in the matter of conservation of both oil and gas, we favor legislative enactment that will relieve the situation and allay the dangers which daily grow more imminent. We feel the following suggestions are in line with our position in the matter:

(1) Texas needs some law by which the orders of the Commission can be enforced while they are being attacked in the courts.

(2) Provisions for speeding up court machinery so that suits attacking the orders of the Commission may be speedily disposed of in the interest of the contestants, the Commission and all others affected by the order involved.

(3) Provisions clarifying the present statutes as they relate to the power of the Commission to prevent the wasteful dissipation of the gas and gas energy of an oil pool.

(Signed) C. V. Terrell, Chairman. Lon A. Smith, Commissioner. R. D. Parker, Chief Supervisior of Oil and Gas."

The Witness: The order of October 13th was telephoned [fol. 589] to General Wolters or dictated over the telephone to his stenographer. I did not send that order through the Adjutant General's Department of the State of Texas. It went direct from my office and then filed with the Adjutant General and approved by the Adjutant General's office. At the time of the issuance of that order on October 13th I knew of this letter of May 19th of the Railroad Commission and the conditions it referred to, but that was not one of the reasons why I issued that order at that time, nor was it a part of the reason. The reason was to prevent what General Wolters referred to as "Hell would be apopping," and I wanted to keep peace over in that part of the country.

In my deposition I made the following statement: "No, sir, not altogether," in response to this question: "I say, inasmuch as the previous law under which the Railroad Commission acted and the orders of the Commission had been attacked in the Macmillan case, and thereby the en-

forcement of the Commission's orders had been embarassed and their enforcement prevented, it was for the purpose of preventing a repetition of those situations—that is, of lack of enforcement while the orders were being attacked—that this particular step was made, was it—your order of October 13th?" It was a very little part of it; the part was to preserve the order and peace in that territory.

I have heard the order which I issued on October 13th read here in the Court Room. I think that order referred [fol. 590] to the entire field. I was not referring to the complainants in this case in this particular part of the order: "Whereas, according to facts presented to me by reliable persons, it is evidence that said organized and entrenched groups of crude petroleum oil and natural gas producers in said East Texas Oil Fields are threatening and planning to openly violate the conservation laws;" because that was in the original proclamation. I stated further in my deposition as follows: " I didn't know Constantin. I didn't know who the people were that brought this suit." When I stated that I was referring to the people attempting to open the wells on these five properties in my deposition I meant opening the wells on any of the properties. I further testified in the deposition: "Yes, but they were threatening to open them," in answer to the question: "Opening those wells on those five properties was the cause of this order?"

Q. Now, at that time did you make the statement: "I am perfectly sure of the legal status of the case. The same question was raised once in regard to martial law at Galveston. A Federal Court issued a restraining order, which was held to be without effect. Common sense indicates that martial law cannot be set aside in that way. The essence of martial law is that it is declared because civil processes are broken down. If a District Judge can enjoin it, martial law is useless." Did you make that statement?

Mr. Moody: May it please the Court, we object to that; [fol. 591] at all events, it could not be material; it would only be the construction of this witness at to what the law is, though he is Governor of Texas, the Court knows that he is not a lawyer, and it is a hard thing to call on him to testify on the taking of his deposition as to what his conception is of martial law.

The Presiding Judge: You are undertaking to prove that he took the action that he did because of certain information. Now they are undertaking to show what his real meaning was, that this was the way to do. I believe it is material.

Mr. Moody: May it please the Court, I consent to that proposition, that we are undertaking to show what he did and why he did it, that is, that he made the order on October 13th for the purpose he has testified of preserving the peace and preventing disorder, and, I take it, the destruction of property, which was, I think, within the constitutional powers of the Governor.

The Presiding Judge: He is cross-examining him.

Mr. Moody: I understand, but his question is what he construed to be or thought to be his legal powers under the law as Governor in the declaration of martial law. I anticipate there will be considerable time taken here in the discussion of that very question of law before this Court and the effect of his question is indirectly to ask the Governor what in his opinion is his power under the law as Chief [fol. 592] Executive in declaring martial law. Now, I submit to your Honor that it is immaterial what he thinks his power may be; he can tell what he did and why he did it and if upon a statement of what he did and how he did it and why he did it it appears that he acted within the power confided in the office that he holds by the Constitution of the State and of the United States, then his action is valid. If, on the contrary, upon a statement of what he did and why he did it, he has not acted within the power given him by the Constitution, why, then his action, I take it, falls, and in neither event can it be material, either to the exercise of his power or his purpose in exercising it as to what he conceived or understood to be the law upon that matter. Ordinarily witnesses will not be interrogated in courts as to what is the law of the land unless it be the matter of proving up the law of some jurisdiction, which there are well known ways of proving it up, and it, I think, is manifestly unfair to call upon a lay witness to testify as to his opinions of law, and that is the effect of that question.

The Presiding Judge: The objection will be overrruled.

Mr. Moody: Note our exception.

The Witness: I said a while ago that many statements had been attributed to me in newspapers and sometimes

they are not as accurate as they might he, but such statement might have been made by me, or in substance to that, I [fol. 593] think, is my answer in the deposition. I don't remember whether I made a statement substantially like that or not, because there were so many statements attributed to me that lots of times did not come from me that I don't know whether I made that statement as it is outlined there or not, and I did not make it that night; it was made a day or so later; I made no statement to the newspapers at all that night. I think I made some such statement in it; the deposition would be the best evidence of it.

On October 13th at the time I issued this order I don't think that I expressed any determination or gave out any such statement as holding the East Texas Oil Field down to the figure as set by the Railroad Commission. I expressed a desire to keep the peace and order in that field. I presume, if it is in there on page 174 of my deposition, I did say that I expressed a determination to hold production in the East Texas Field down to the amount specified in the order issued by the Railroad Commission at that time, but, for the purpose of preserving order and peace in East Texas was the main reason.

I remember having been shown at the time of the taking of my deposition a newspaper article under date of August 17th, purporting to be an interview or a statement of General Wolters to the effect that "When the military forces took charge of that field, meaning the East Texas Field, oil was selling at 10 cents a barrel, less the gathering charge [fol. 594] of five cents a barrel. Today oil is selling for not less than 68 cents in the East Texas Field. The imposition of martial law has saved not only the land owners and operators, but is bringing into the State Treasury approximately $3,500 per day from the production tax on oil alone and the royalty owners are now being paid their royalties." I don't know that I saw that statement before it was issued. I say perhaps it might have been shown to me, but I know that General Wolters prepared a statement; it may have been shown, I am not sure.

At the time that this injunction was granted on the 13th day of October I perhaps made a statement somthing along this line: "This is the State's affair and Federal Courts should let the State take care of it." I don't know as I made that exact statement. As to whether I made the

statement that the plaintiffs in this case had enjoined the wrong parties, I will say I expect the newspaper boys said that. I did have notice of the issuance of the injunction, but there was no injunction issued against me. I did have notice that there was an injunction issued at the time I issued this order; I had rumors that it was issued. I don't know that you would call it actual notice; it was rumored; somebody phoned me that the newspapers were carrying an article. General Wolters stated to me what these newspapers in Tyler said; he got his information from the newspaper. He told me the Tyler newspapers were carrying something to that effect and I think he had gotten [fol. 595] that over the telephone from Tyler that that was the case.

As to whether or not at that time I made the statement in response to a question: "What would follow should the Federal Court which granted the injunction order its marshals to open the wells?" as follows: "I guess I have more men there than they have," I will say that is another newspaper report. I think I have told that I may have said that and I expect I had more men than he had marshals, but it was a jocular statement, if it was. To be exact, I expect I did say, "I expect I did."

I received a letter from the Kansas Commissioners on November 30th asking for a meeting of the different states' representatives to be held in Tulsa, to which I replied that I would not send anyone and did not send anyone to the meeting. Referring to page 185 of my deposition, I did identify the papers now handed to me as a copy of the original letter which I received from Mr. Hill and the letter following as my reply to him. They are the letter which I received and the letter I wrote at that time.

(The letters identified by the witness are as follows:)

"State of Kansas Public Service Commission

Jesse W. Greenleaf, Chairman, Topeka; Thurman Hill, Chas. W. Campbell, Commissioners. Herman L. Gees, Secretary.

[fol. 596] November 12, 1931.

Hon. Ross S. Sterling, Governor, State of Texas, Austin, Texas.

DEAR GOVERNOR: It has been suggested that the regulatory bodies in charge of oil prorations of the States of Texas,

Oklahoma and Kansas, meet in Tulsa, on November 30, for the purpose of discussing conservation measures. The Corporation Commission of Oklahoma will be represented at the meeting and the Kansas Commission will be represented by the writer. We extended an invitation to the Railroad Commission of Texas to attend and received a letter in which they stated, "I think your suggestion that the Commissions of Oklahoma, Kansas, and Texas meet in Tulsa on November 30 is a good one, but as proration has been taken entirely out of the hands of this Commission and turned over to martial authorities in East Texas, I do not think it advisable for us to attend." This being the situation would suggest you send a representative and perhaps you can persuade a member of the Commission to attend.

At this conference we should determine whether or not [fol. 597] it is advisable to further reduce the allowables for the three states, and also discuss what should be done in regard to future drilling, particularly in new fields. Our Commission has issued a temporary order restricting new Kansas fields to one well per 40 acres. It would help us to get the viewpoint and assistance of Oklahoma and Texas before the order is made permanent.

Assuring you of our appreciation of your efforts in assisting the industry, beg to remain,

Yours respectfully, Public Service Commission.
Thurman Hill, Commissioner.

November 17, 1931.

Thurman Hill, Commissioner, Public Service Commission,
Topeka, Kansas.

Dear Mr. Hill: Answering your letter of the 12th, regarding a proposed meeting of the Corporation Commission of Oklahoma, the Kansas Commission and the Railroad Commission of Texas, in Tulsa, on November 30th, will say that in view of what has transpired in oil circles in the last few days, and the fact that there are certain elements in this state that are endeavoring to make capital out of the fact that the three states have tried to get together on the question of oil conservation, it likely would be best not to [fol. 598] hold such a meeting.

The East Texas field seems to be extending and I have information that a well has been brought in or is ready

to come in that will extend it some three miles. You can see that the problems are not lessening any.

Sincerely yours, —— ——, Governor."

Mr. Bailey:

Q. Now, Governor, in that connection you meant by conservation there the reduction of that oil production of each State, did you not?

A. Not—conservation would not—I think, Mr. Bailey, it would mean production; it might mean it all.

Q. Well, that meeting was suggested because the price of oil had not gone up to $1.10 a barrel?

A. I didn't know anything about that. Mr. Hill did not make that statement to me over the telephone.

Q. Well, as a matter of fact, in your theory of conservation—that is, conservation of the resources, of oil, you attempted to prevent imports in accordance with your theory, did you not, importations of oil?

A. Well, there certainly was quite an extended effort to prevent imports.

Q. And that was in accordance with your theory of conservation was it not?

[fol. 599] A. No, sir. I would n't say that it would be conservation.

In my answer to Mr. Smith in my deposition I may have answered, "Yes, sir," to his question: "As a part of the conservation measures that the several oil-producing states were trying to work out, one of the things you wanted to prevent was importation of large amounts of oil from foreign countries?" but in order to conserve the oil in this country it might be well to use the oil of another country, if you were going to conserve it, as far as that is concerned. The importation of oil had nothing to do with the amount of oil that could be used in the United States.

In my deposition in answer to Mr. Bailey's question: "Will you explain what that had to do with your conservation efforts, the importation of oil?" I answered: "Well, it had something to do with the amount of oil that could be used in the United States, of course, just like if they were importing cotton into this country. There is no tariff on oil. It had been a question in Congress."

My efforts at conservation were not to do something which would be interrupted or prevented by the further

importation of oil into this country; I just said that in so far as saving or conserving of oil in this country, you might say we ought to import all the oil into this country so far as conservation is concerned. Importation has nothing to do with the conservation program, but it might have something to do with the amount of oil that could be used in this country.

[fol. 600] In my deposition on page 189 I was asked: "That is why you said it would affect your conservation efforts. Your efforts were for the purpose of doing what the importation of oil would break down?" and I answered: "Well, in a measure, yes. Of course, if they were going to keep all the oil in this country, it would, but I think they are not going to do that."

That meeting of February 28, 1931, in Fort Worth was the meeting at which the Oil States Advisory Committee was organized, I think, but it was not called for that purpose.

Examination by the Court:

Q. When you took over the matter from the Commission or took it over from anybody in October the Commission had made an order for 165 barrels, you say?

A. Yes, sir.

Q. Now, you adopted that matter as your fixation and directed the General to see that that was enforced in October?

A. Yes, sir.

Q. Then when the Commission ran out—the Commission's orders, or before they expired on November 1st, you made another order, didn't you, reducing that again?

A. There was one order to 150.

Q. In October while the Commission's orders were still in force?

A. Well, I don't know the date, Judge.

[fol. 601] Q. Well, anyway, you made one in October. Now, why was that one made?

A. The same reason.

Q. Well, what was your reason?

A. Well, in order to keep down trouble over there.

Q. You had to have a very nice mathematical ascertainment just when trouble was going to show up and you could hit it every time?

A. Well, I only had what I got from East Texas, the representations I got from over there.

Q. And they had it all figured out over there?

A. Yes, sir, whenever they felt water was destroying the field, or too much being withdrawn would bring in water, why, then they began to holler.

Q. Now, who was investigating the water business over there?

A. Well, the military forces and the people, the producers generally, and the reports from the Railroad Commission, they were working with the wells so far as conservation is concerned.

Q. You were making the order and trying to enforce the statute on preventing waste, is that what you were doing?

A. Yes, sir, and to prevent—to preserve the peace, Judge.

Q. I know the peace.

A. I might say this and shorten this whole thing, if it wasn't for the fear of trouble, the military forces would be withdrawn immediately.

[fol. 602] Q. That is all right, but you couldn't have kept the peace there and maintained the allowable which the Commission fixed, could you?

A. Well, the allowable which the Commission fixed, you see, was increasing the number of wells that was being drilled in the field.

Q. What is keeping the peace, I mean did you have some kind of general understanding that you would allow 400,000 barrels for that yield?

A. Well, I think, if your Honor please, it has been brought out that withdrawing the amount of oil that would have a tendency to absolutely destroy the field and bring water in, that is when the people would get on the warpath.

Q. That was 400,000 barrels?

A. Well, not necessarily or absolutely 400,000 barrels, but that seems to be the figure that was fixed by the Railroad Commission, from 350 to 400 thousand barrels and seemed to be the figure that was represented by the experts, oil experts and geologists that claim to know what would cause destruction of the field and draw in water.

Q. Well, the Commission issued a per-well order that was based on a distribution over all the wells in the field of an allowable of 400,000?

A. Yes, that was based on the number of wells that were there then which made the production a little less than 400,000 barrels.

[fol. 603] Q. And when you took charge of the matter you really——

A. (Interrupting.) No, when the wells increased the Commission reduced the amount per well.

Q. So you did the same thing?

A. Yes.

Q. You really didn't have any notice of any excitement, you just saw the time had come to make a new division?

A. No, I wouldn't say that, I certainly did have notice of excitement; the reports were coming to me that if the amount was not reduced there would be trouble.

Q. And you felt that with the whole power of the State of Texas in your hands that whether you liked it or not you would have to reduce that allowable to keep trouble from coming up.

A. Well, I think it is better to use a preventative, Judge, than to have——

Q. (Interrupting.) Suppose the trouble makers had told you to shut it altogether and keep it shut, you would have done it?

A. Well, I don't know as I would, because I don't think the trouble makers would have done anything like that.

Q. You mean as Governor of Texas if people owning oil in that pool tried to get it out and somebody said, "Well, Governor, you can't let this man get that oil because we will shoot them," and you said, "All right, I won't let them get it."

A. Well, I wouldn't have gone that far with it.

Q. Well, how far would you have gone with it, that is what we want to get.

[fol. 604] A. Just as far as I have gone.

Q. Well, I see, you have gone just exactly right each time.

A. Well, I don't say I have gone exactly right each time, because anybody that says that might be wrong.

Q. And you might have allowed a little more or less, but why is it you always allow less, why is it that you put it down until it is now 350,000?

A. Well, they are pulling it down themselves.

Q. Who is?

A. The oil people, they are shutting down on Sundays and doing many things to limit production.

Q. So the oil people are really wanting to reduce it themselves, the oil people want the reduction?

A. I think some of them want it, yes.

Q. Then it is the oil people that are really causing the insurrection, if you don't put it down?

A. Well, I think, Judge, if it wasn't for the oil field over there, we would never have been here on this particular case.

Q. I know that, because you have got to have some kind of a case.

A. Yes.

Q. But you never did—you had this general idea of 400,000 and every time you would make a new order you had no purpose in mind except to keep the ratio of allowable per well within 400,000. Now, isn't it a fact that every well you have got a hundred barrels—that there is [fol. 605] less than 4,000 wells there, isn't there?

A. There is about 3600 or 3700.

Q. Now, you have an allowable of a hundred barrels a day?

A. But I never did fix it on 400,000; I never did fix any on a certain particular amount.

Q. But the General said 400,000 was in the mind of the people that you acted on.

A. Well, that may be true, but as far as I am concerned, I never figured on 400,000 or 500,000.

Q. What you had in mind, you didn't have any figure at all?

A. I was relying on reports I got from over there, Judge.

Q. Now, Governor, you were relying on reports which you got from over there and I thought at first it was 400,000, that was the saturation point the people would stand and you would not let it go above that, but now you have got it down to 350,000; how did you get it down there?

A. Reducing the amount per well.

Q. I mean why? Have the people now gotten to the point of 350,000 as their starting point?

A. No, the information——

Q. (Interrupting.) Who told you—who gave you that idea of a hundred barrels?

A. Well, the reports that I got from the——

Q. (Interrupting.) Did General Wolters suggest a hundred barrels?

[fol. 606] A. Yes, sir, he suggested it ought to be reduced or there would be trouble a number of times.

Q. And in each order when you made it has it been on the statement of General Wolters or somebody else that the allowable should be so many barrels per well?

A. Well, those things were following the line of the Railroad Commission's orders, Judge.

Q. Then you have just been really trying to keep that thing down——

A. (Interrupting.) I would much prefer, if you take my personal viewpoint, I would much prefer that somebody else was doing this, that the Railroad Commission was doing it themselves.

Q. I know that, but we are reviewing their orders and trying to find out what relation they have got to the peace.

A. Well, I have told you a number of times that they had everything to do with it; in fact, in the beginning it had everything to do with it.

Q. I am not talking about the past, the original declaration in August; we are taking up now the new declaration or the new activities to take it away from the action of the Federal Court.

A. Well, Judge, there is no one to take hold of it now; the Railroad Commission hasn't followed the suggestion that I made to them, that I know of.

Q. What are you going to do? Are you going to reduce [fol. 607] it now day by day?

A. Well, I don't know just what I am going to do; we will have to wait and see what takes place.

Q. Now, then, what is going to be the guide and what was the guide in the past for these particular numbers in the wells? I thought 400,000; you say "No." Then what was it? Why did you make it a hundred this last time?

A. I said that I had no particular mark, that what I was relying on, Judge, was the information that come from the field.

Q. Now, Governor, isn't it a fact that this question of price, while it is true that you issued that proclamation all right, that this question of price is the real important

thing, and you made speeches, as the Governor should do, that the State was being ruined by the reduced price of oil, the oil companies couldn't produce it and couldn't make any money out of the price of gasoline and you know that price is an important feature in this matter, isn't it?

A. I think so; I think the price has a great deal to do with what these oil men—they wouldn't be in the business if it wasn't the dollar they were hunting for.

Q. But you tell the Court on your oath as Governor that price has had nothing to do with your fixing of these allowables?

A. Not so far as the orders I have fixed; I have never entered into the question of price to any great extent; of [fol. 608] course, I am interested as Chief Executive of the State in the revenue that is coming to the State and the State is interested in the gross production of oil, that is the point.

Q. What made you reduce this last allowable from 400,000 down below 360,000, that is the present order?

A. For the same reason the others were reduced.

Q. Now, have you got any more information that you have to reduce it again?

A. No, they seem to be pretty well satisfied over there; in fact, I, as the record will show, have called in the Commission and asked them if they don't think it would be well for them to hold a hearing with a view of taking hold of their work over there in the East Texas field.

Q. You couldn't do that, Governor?

A. They couldn't do that because of the injunction, yes.

Q. Somebody will issue an order against them and you will have to take it away?

A. Well, I hope they don't, Judge.

Q. But your idea is as Governor, whenever a man resorts to the Courts to decide a question of whether the law is constitutional or valid that it is your duty to prevent his act by taking hold of the field?

A. No, I don't——

Mr. Moody (interrupting): May it please the Court, the defendants desire to take an objection to the question on the ground that the power of the Governor is controlled by the Constitution and it is immaterial on the issues that [fol. 609] are addressed to the Court and on the further

ground that the proclamation of the Governor, in declaring a state of insurrection exists, is a power vested by the Constitution of the State and of the United States in the discretion of the Chief Executive of the State and in the exercise of that discretion it is not subject to review; that he may act wisely or unwisely, for a good reason or a poor reason, but that if he has exercised that discretion it is not subject to review.

The Presiding Judge: Well, the Court sustained the objection against Judge Bryant; I will have to let the other Judges pass on the objection.

Judge Grubb: I overrule the objection.

Mr. Moody: Note our exception.

The Presiding Judge:

Q. I asked you that if you tried to put it back in the Commission's hands, like you say you are doing, or trying to do, and for some reason, which is not important, you say they are not doing it, won't you have to have martial law again if any citizen tries to find out whether his property is being taken without due process of law? Won't you have the same insurrection again?

A. Well, I don't know whether I will or not, Judge.

Q. You couldn't tell about that?

A. I couldn't tell about that until the time comes.

Q. And each time that each one of these orders have [fol. 610] been issued reducing the allowable it has been because you felt that there would be insurrection unless you yielded to the demands of the people to reduce the allowable?

A. That is the information that I had.

Q. I mean that is the theory?

A. Yes, sir.

Q. That is what you think?

A. Yes, sir.

Q. All right.

Redirect examination.

By Mr. Smith:

I am constantly receiving reports and information from people living in this martial law district, in regard to con-

ditions there, among them being that unless production is held down they will destroy the field itself physically by salt water and that sort of thing. Regardless of all that, in declaring martial law and in enforcing it in that district, my purpose is to maintain law and order and preserve the peace and protect life, liberty, and property; I certainly would not have the troops there if it were not for that purpose. In restricting the production over there of oil I did that in order to maintain peace and protect life, liberty, and property; that was my purpose. I did that in good faith and the honest belief that it was necessary to restrict production of oil in order to maintain this peace [fol. 611] and law and order over there, and if it wasn't for maintaining the peace and the belief that it was necessary to have the troops there, they would not be there; I would take them away tomorrow.

Recross-examination.

By Mr. Bailey:

I have issued no written order to the Commanding General or to the Adjutant General or any other officer connected with the enforcement of the law over there to search out or to apprehend any man who makes threats of violence to private property or any man who seeks to conspire for that purpose, but the Adjutant General in the early part of the field was instructed by me to send Rangers there to see that the hijackers and the violators were taken care of and I think they have done it very well. I did not receive a letter from anyone stating that he personally would do some of this blowing up. General Wolters had a letter from a man saying he knew of certain people, but he did not say he would do it himself. When I got that letter I filed it and I think I told General Wolters about the letter. I did not instruct General Wolters to make any investigation; I did not think it was necessary as to that; he is so well known. I have never gotten any report of any investigation of that particular item. I don't know whether I would have gotten such a report if an investigation had been made or not. If there had been an arrest or [fol. 612] anything like that, I might have heard of it. They do not send all their investigations unless there is

some result comes from the investigation; I don't have the details of the field work. I have never asked for a report on that particular case, and that is the only case like that that I had in the way of a letter.

Thereupon the evidence was closed.

[fol. 613] IN UNITED STATES DISTRICT COURT

STIPULATION RE STATEMENT OF EVIDENCE

It is hereby stipulated by the parties hereto, acting by their respective counsel, for the purpose of settling the record for appeal to the Supreme Court of the United States, that the within and foregoing is a true and correct statement in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted, and the testimony of witnesses being stated only in narrative form save that at the request of respondents and by direction of the court, the examination of certain of the witnesses by the Court is reproduced in the exact words of the witnesses; and it is further agreed that the same shall constitute the Statement of Evidence on this appeal.

Bailey, Nickels & Bailey, by Jos. W. Bailey, Jr., Solicitors for Complainants E. Constantin and J. D. Wrather. Dan Moody, E. F. Smith, Solicitors for Respondents R. S. Sterling, Jacob F. Wolters and W. W. Sterling. ——— ———, Solicitors for Other Respondents.

IN UNITED STATES DISTRICT COURT

ORDER APPROVING STATEMENT OF EVIDENCE

At the request of respondents R. S. Sterling, Jacob F. Wolters and W. W. Sterling, the examination of certain witnesses by the Court is ordered set forth in the statement of evidence in the exact language of the witnesses, and upon [fol. 614] the stipulation of the parties hereto it is ordered that the within and foregoing statement of evidence in

narrative form shall be and the same is hereby approved and ordered filed as the statement of evidence on this appeal for transmission to the Supreme Court of the United States as a true and correct statement of the evidence before the Court.

Jos. C. Hutcheson, Jr., United States Circuit Judge.
Randolph Bryant, United States District Judge.
Wm. I. Grubb, United States District Judge.

[File endorsement omitted.]

[fol. 615] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Feb. 26, 1932

And, now, at the time of filing their petition for appeal, and the allowance thereof, come R. S. Sterling, Jacob F. Wolters and W. W. Sterling, three of the Defendants and Appellants, and make and file their Assignment of Errors as follows:

I

The court erred in finding that it had jurisdiction to hear, determine and grant the injunction against these Defendants, the Governor of Texas, the Commanding Officer of the military forces of the State of Texas, and the Adjutant General of the State of Texas.

II

The court erred in finding that it had jurisdiction to inquire into and determine whether, as a matter of fact, an insurrection or riot, or imminent danger thereof, existed in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, at a time when the Governor of Texas, in the exercise of his discretion and judgment, had determined that an insurrection and riot, or imminent danger thereof, did exist, and had by proclamation declared Martial Law, [fol. 616] which was in force and effect at the time of the hearing and decision of this case, and which was declared for the purpose of suppressing and preventing insurrection

and riot in said Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas.

III

The court erred in finding that the evidence showed no insurrection or riot existed in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, on August 16, 1931, or on October 13, 1931, or at the time this cause was heard and decided by this court.

IV

The court erred in finding that there was no warrant in the evidence for the belief, on the part of the Defendants and Appellants, R. S. Sterling and Jacob F. Wolters, that there was imminent danger of insurrection or riot in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, on August 16, 1931, or on October 13, 1931, or at the time this case was heard and decided by this court.

V

The court erred in finding that the Defendant and Appellant, R. S. Sterling, as Governor of Texas, had ousted the Railroad Commission of the State of Texas from the exercise of its jurisdiction in the matter of enforcing the conservation laws of the State of Texas, as applied to the production of crude petroleum.

VI

The court erred in finding that the Defendant and Appellant, R. S. Sterling, as Governor of the State of Texas, had no authority under the Constitution and laws of the State of Texas to declare Martial Law.

VII

The court erred in finding that the restriction placed by the Governor upon the production of crude petroleum by the Plaintiffs, during the existence of Martial Law under the Constitution and statutes of Texas, as a means of preventing and suppressing insurrection and riot, or imminent danger thereof, was a taking of the plaintiffs' property or a trespass upon the property rights of the Plaintiffs, in

[fol. 617] violation of the 14th Amendment to the Constitution of the United States.

VIII

The court erred in finding that this suit, insofar as it is against these Defendants and Appellants in their official capacities, as Governor of the State of Texas, as Adjutant General of the State of Texas, and as Commanding Officer of the military forces during martial law, was not a suit against the State of Texas.

IX

The court erred in granting the injunction against these Defendants and Appellants, enjoining them, and each of them, in their official capacity, from interfering with the production of oil by plantiffs from land situated in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, at a time when, according to the judgment and discretion exercised by the Defendant and Appellant R. S. Sterling as Governor of the State of Texas, there was insurrection, riot and tumult, and imminent danger thereof, in said counties, and at a time when by proclamation of the Governor martial law was being maintained and enforced in said counties.

X

The court erred in granting the injunction as against these Defendants and Appellants, and as against each of them, because the judgment, order or decree of the court, granting such interlocutory injunction, is without support, either in the facts or by the law of this case.

XI

The court erred in holding that it had jurisdiction to review, inquire into, and control by injunction the means employed by the Defendant and Appellant, R. S. Sterling as Governor of Texas, under martial law, to suppress the insurrection and riot, and imminent danger thereof, found and declared by him to exist in his proclamation declaring Martial Law, in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, and in substituting its judg-

[fol. 618] ment and discretion for that of the Governor of Texas in determining the means to be employed under Martial Law to suppress the riot and insurrection, and imminent danger thereof, found to exist in the proclamation declaring Martial Law.

XII

For which errors found in the record and because of each of them, the above named persons in their official capacity, Defendants in the trial court, now Appellants, pray for a reversal of the decree, judgment or order of the District Court of the United States for the Eastern District of Texas, which was entered in this cause, granting an interlocutory injunction against these Appellants after a hearing, and upon the authority of a three-judge court constituted and organized as provided and authorized by Section 266 of the Judicial Code; and the Appellants pray for such other relief as they may be entitled to receive.

Dan Moody, E. F. Smith, Attorneys for R. S. Sterling, Jacob F. Wolters, and W. W. Sterling, Defendants and Appellants.

[File endorsement omitted.]

[fol. 619] In United States District Court

[Title omitted]

Petition for Appeal—Filed Feb. 26, 1932

Your Petitioners, R. S. Sterling, Jacob F. Wolters, and W. W. Sterling, Defendants in the above entitled cause, respectfully represent and show that in said cause pending in the United States District Court for the Eastern District of Texas, Tyler Division, there was entered on the 26th day of February, 1932, a decree, judgment of order, granting plaintiffs' application for an interlocutory injunction, as prayed for in their complaint in said suit, as against these Defendants, which application for interlocutory injunction was heard and d-termined by a three-Judge court, in accordance with the provisions of Section 266, of the Judicial Code. Your Petitioners, conceiving themselves aggrieved, injured

and prejudiced by said decree, order and judgment, which is believed by them to be erroneous and inequitable, hereby appeal from said decree, order or judgment to the Supreme Court of the United States, and they pray that their appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree, order or judgment was made, duly authenticated, may be sent to the Supreme Court of the United States, and the proper order touching the security required of your Petitioners be made.

And now, at the time of the filing of this petition for [fol. 620] appeal, *for appeal*, your Petitioners file an Assignment of Errors, setting up separately and particularly each error asserted and intended to be urged in the Supreme Court of the United States.

Wherefore said R. S. Sterling, Jacob F. Wolters and W. W. Sterling, Defendants and Appellants, pray that their appeal be allowed.

Dan Moody, E. F. Smith, Attorneys for R. S. Sterling, Jacob F. Wolters, and W. W. Sterling, Defendants and Appellants.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

And, now, to-wit, on this the 26th day of February, 1932, at Tyler, it appearing to the court that the above named Defendants and Appellants have filed an Assignment of Errors, and have filed a good and sufficient appeal bond in the required amount, which bond has this day been approved by us, it is ordered that the appeal prayed for in foregoing petition be and the same is hereby allowed as therein prayed for.

Jos. C. Hutcheson, Jr., United States Circuit Judge. W. I. Grubb, United States District Judge. Randolph Bryant, United States District Judge.

[File endorsement omitted.]

[fols. 621-623] Bond on appeal for $1,000, approved and filed February 26, 1932, omitted in printing.

[fol. 624] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR STAY OF INJUNCTION PENDING APPEAL—Filed Feb. 26, 1932

Your petitioners, R. S. Sterling, Governor of the State of Texas; Jacob F. Wolters, Brigadier General Texas National Guard, and Commanding Officer of the Military District, composed of Gregg, Upshur, Rusk and Smith Counties, in the State of Texas; and W. W. Sterling, Adjutant General of the State of Texas, Defendants in the above entitled cause, move and pray the court to stay the interlocutory injunction heretofore granted in this cause, pending an appeal therefrom to the Supreme Court of the United States, upon the filing of bond in such an amount as the court may direct.

In support of the foregoing motion, Petitioners represent and show to the court that the restrictions and restraints placed upon the power and authority of the Governor of Texas by the interlocutory injunction granted in the above cause, restrict and restrain the Governor of Texas from taking such action as in his judgment and discretion he has determined to be necessary, and the only means at his command, to suppress the insurrection and riot which he, in the exercise of his judgment and discretion, has found to exist in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas.

Petitioners further represent that the Governor of Texas, by proclamation, has officially declared the existence of insurrection and riot, and imminent danger thereof, in the above named counties, and, as appears from said proclama-[fol. 625] tion, has exercised his judgment and discretion and has determined that it was necessary to restrict production of oil by Plaintiffs from wells located in the counties under Martial Law, and has, in the exercise of his discretion, as is shown by said proclamation, determined that it was necessary to restrict production of oil by Plaintiffs from wells located in the counties under Martial Law ans has, in the exercise of his discretion as is shown by said proclamation, determined that the restrictions placed by him upon the production of oil by plaintiffs from wells located in the counties under Martial Law, are necessary

and the only means at his command to suppress and prevent the condition of insurrection and riot, and imminent danger thereof, now existing in the above named counties. Said proclamation, together with the sworn testimony by deposition and given orally by the Governor on the witness stand during the hearing of this case by the three-judge court, constitu*t*uted as provided by Section 266 of the Judicial Code, is a part of the record in this cause.

In the alternative, your Petitioners pray and move the court that in the event their prayer and motion for a stay order pending appeal be overruled, refused and denied, then and in that event, that Your Honors grant a stay of the injunction until such time as your Petitioners may present to the Supreme Court of the United States, or the proper justice thereof, an application for a stay of the injunction pending the appeal, and fixing a reasonable time in which your Petitioners may present such petition or motion to the Supreme Court of the United States, or the proper justice thereof.

Respectfully submitted.

E. F. Smith, Dan Moody, Attorneys for R. S. Sterling, Jacob F. Wolters, and W. W. Sterling, Defendants.

The above petition or motion to stay the injunction granted in the above cause, pending an appeal to the Su-
[fol. 626] preme Court, has been presented to and considered by us, and after full consideration, we are of the opinion that the same should be and is overruled, refused and denied.

Jos. C. Hutcheson, Jr., U. S. Circuit Judge; W. I. Grubb, U. S. District Judge; Randolph Bryant, U. S. District Judge, Constituting the Statutory Court Which Heard Plaintiffs' Application for Interlocutory Injunction.

[fol. 627] IN UNITED STATES DISTRICT COURT

[Title omitted]

AGREEMENT AS TO DOCUMENTS WHICH SHALL CONSTITUTE THE RECORD ON APPEAL—Filed Feb. 26, 1932

The parties hereto, waiving præcipe, have agreed that the following documents shall constitute the record on appeal:

1. Plaintiffs' Original Bill.
2. Plaintiffs' First Amended Original Bill.
3. Plaintiffs' Supplemental Bill.
4. Plaintiffs' First Supplemental Petition responding to matters and things stated and averred in the answer filed by the defendants.
5. Answer of the Defendants, R. S. Sterling, Jacob F. Wolters and W. W. Sterling, to the First Amended Original Petition and Bill of Complaint of Plaintiffs.
6. Answer of Defendants, C. V. Terrell, Lon A. Smith, and Pat M. Neff, to Plaintiffs' First Amended Original Petition and Bill of Complaint.
7. Amendment to Answers of defendants, R. S. Sterling, Jacob F. Wolters and W. W. Sterling,
8. Decree of the court granting iterlocutory injunction.
9. Opinion of the court authorizing the granting of the interlocutory injunction.

[fol. 628] 10. Statement of evidence on appeal.

11. Assignment of Errors.
12. Petition for Appeal and allowance thereof.
13. Appeal Bond.
14. Motion of Defendants R. S. Sterling, Jacob F. Wolters, and W. W. Sterling for stay of injunction pending appeal.
15. Agreement as to papers composing the record.
16. Waiver of citation on appeal.
17. Cost Bill.
18. Certificate of the Clerk.

E. F. Smith, Dan Moody, Attorneys for Defendants and Appellants R. S. Sterling, Jacob F. Wolters, and W. W. Sterling. Jos. W. Bailey, Jr., Luther Nickels, Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 629] IN UNITED STATES DISTRICT COURT

[Title omitted]

WAIVER OF CITATION—Filed Feb. 26, 1932

Defendants R. S. Sterling, Jacob F. Wolters, and W. W. Sterling, having filed their Assignment of Errors, Peti-

tion for Appeal, and Appeal Bond, and having been allowed an appeal to review the above entitled cause in the Supreme Court of the United States, Plaintiffs in said cause, by their attorney, do hereby waive the issuance and service of a citation, and said attorney does enter his appearance in the Supreme Court of the United States.

Dated this 26th day of February, 1932.

E. Constantin, J. D. Wrather, Plaintiffs, by Bailey, Nickels & Bailey, Their Attorney, by Jos. W. Bailey, Jr.

[File endorsement omitted.]

[fol. 630] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 631] In United States District Court

[Title omitted]

Bond on Injunction—Filed Feb. 26, 1932

Whereas, in the above styled and numbered Cause, the complainants, E. Constantin and J. D. Wrather, were, on the 26th day of February, A. D. 1932, awarded and decreed a temporary injunction against the respondents, Honorable Ross S. Sterling, Honorable W. W. Sterling and Honorable Jacob F. Wolters, in words and figures, as follows:

"It is, accordingly, on this the 26th day of February, A. D. 1932, ordered, adjudged and decreed by this Court that the respondents, Hon. Ross S. Sterling, Hon. W. W. Sterling and Hon. Jacob F. Wolters, and all persons acting for or with or under the direction of them, be and they are hereby enjoined from enforcing against complainants any of their so-called military or executive orders, passed or to be passed, regulating or restricting the production of oil from the complainant's wells, or from in any manner, directly or indirectly, interfering with the lawful production of oil from complainant's property.

This injunction to remain in force, subject to the further orders of this court, until the final adjudication of this Cause; and complainants will post a bond in the penal sum

of $1,000.00, conditioned as required by law for injunction bonds of this character, and upon the filing of such bond and the approval thereof by the Clerk of this Court, writs in accordance with this decree will be issued."

Now, therefore, know all men by these presents that we, E. Constantin, and J. D. Wrather, as Principal, and C. D. Murray, T. W. Murray and L. G. Good, Sureties, do hereby acknowledge ourselves bound and obligated to pay to Ross S. Sterling, W. W. Sterling, and Jacob F. Wolters, respondents, the sum of One Thousand ($1,000.00) Dollars, conditioned that the said E. Constantin and J. D. Wrather, complainants in said Cause, will abide the decision which may be made therein and pay all sums of money and costs that may be adjudged against them if the injunction [fol. 632] awarded and decreed in said Cause be dissolved in whole or in part.

Witness our hands this the 26th day of February, A. D. 1932.

J. D. Wrather, E. Constantin, Jr., Principals. C. D. Murray, Nashville, Ark.; T. W. Murray, Overton, Tex.; L. G. Good, Overton, Texas, Sureties.

Approved this 26th day of February, A. D. 1932.

F. A. King, Clerk of the United States District Court for the Eastern District of Texas, by J. R. Blades, Deputy. (Seal.)

[File endorsement omitted.]

[fol. 633] Clerk's certificate to foregoing paper omitted in printing.

[fol. 634] IN SUPREME COURT OF UNITED STATES

STATEMENT OF POINTS RELIED ON BY APPELLANTS AND DESIGNATION TO PRINT ENTIRE RECORD—Filed March 7, 1932

The appellants, on this appeal, will rely on the following points:

Point 1. It was an abuse of judicial discretion for the three Judge Court, on an application for temporary injunc-

tion, to enjoin the Governor of the State of Texas during the existence of insurrection and riot and imminent danger thereof, in the East Texas oil field, from interfering with appellees production of oil from their oil wells, when the Governor had found and declared that during the emergency created by the riot and the imminent danger thereof, that it was necessary in order to suppress and prevent insurrection and riot, that production of oil be restricted from all wells in the East Texas field, including those of appellees.

Point 2. The three Judge Court has no jurisdiction to review, inquire into, and control by injunction the means employed by appellant, R. S. Sterling as Governor of Texas, under martial law, to suppress the insurrection and riot and imminent danger thereof, found and declared by him to exist in his proclamation declaring martial law, in the counties of Gregg, Upshur, Rusk, and Smith, in the State of Texas.

Point 3. The suit is against R. S. Sterling, in his official capacity as Governor of the State of Texas, W. W. Sterling in his official capacity as Adjutant General of the State of Texas, and Jacob F. Wolters in his official capacity as Commanding Officer of the Military Forces in the field, and is for the purpose of restraining them from taking action [fol. 635] found by the Governor to be necessary in order to suppress and prevent insurrection and riot, and is in fact and in law a suit against the State of Texas, without its consent, and in violation of the eleventh amendment to the Constitution of the United States.

Point 4. The evidence, and it is not controverted, establishes the fact of insurrection and riot or at least imminent danger thereof.

We ask that the entire record be printed.

Dan Moody, E. F. Smith, Attorneys for Appellants.

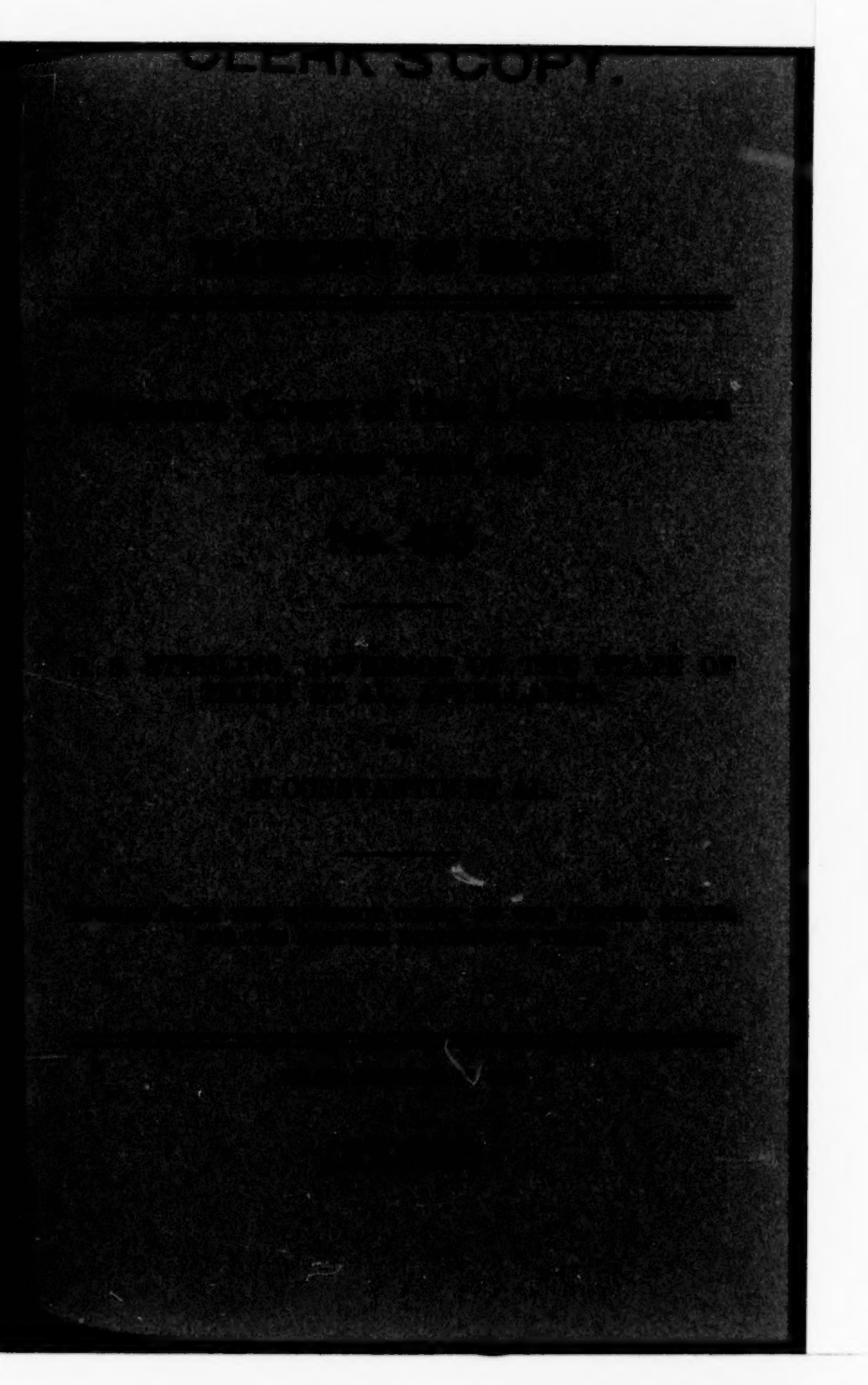
[fol. 636] I have on this the 7th day of March, 1932, mailed, by registered maid, from Washington, D. C., to Joseph W. Bailey, Jr., Esquire, Dallas, Texas, Attorney of Record for appellees, a true and correct copy of the statement of points which will be relied upon by appellants in this cause and

which statement I have this day filed with the Clerk of the Supreme Court of the United States.

E. F. Smith, Attorney for Appellants.

[fol. 637] [File endorsement omitted.]

Endorsed on cover: File No. 36,560. E. Texas D. C. U. S. Term No. 746. R. S. Sterling, Governor of the State of Texas, Jacob F. Wolters, Brigadier General, etc, et al., appellants, vs. E. Constantin et al. Filed March 1, 1932. File No. 36,560.



(37,150)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 453

R. S. STERLING, GOVERNOR OF THE STATE OF TEXAS ET AL., APPELLANTS,

vs.

E. CONSTANTIN ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS

INDEX

	Original	Print
Record from district court of the United States, Eastern Texas	1	1
Caption	1	1
Stipulation as to consolidation, etc	2	1
Stipulation as to evidence	6	4
Judgment	10	7
Petition for appeal and order allowing same	13	10
Bond on appeal (omitted in printing)	15	
Assignments of error	18	11
Waiver of citation	22	14
Agreement as to transcript of record	23	15
Statement of points to be relied upon and designation to print entire record	26	16
Clerk's certificate (omitted in printing)	28	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 19, 1932

[fol. 1] CAPTION

Record of the proceedings of the three judge court, organized as provided by Section 266 of the Judicial Code (28 U. S. C. A. Sec. 380), of the District Court of the United States for the Eastern District of Texas, in the cause and matter hereinafter stated, the same being disposed of on the 21st day of September, A. D. 1932, at a term of said court held in the city of Houston, Texas, present the Honorable Joseph C. Hutcheson, Jr., United States Circuit Judge for the Fifth Circuit, United States District Judge Randolph Bryant, and United States District Judge W. I. Grubb.

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION.

In Equity. No. 365

E. CONSTANTIN et al.

vs.

LON SMITH et al.

STIPULATION AS TO CONSOLIDATION, etc.—Filed May 30, 1932

The parties to the above entitled and numbered cause which has heretofore been heard on an application for an interlocutory injunction before a three judge Court, composed of the Honorable J. C. Hutcheson, Jr., Judge of the Circuit Court of the United States for the Fifth Circuit, and Honorables W. I. Grubb and Randolph Bryant, United States District Judges, and an interlocutory injunction granted against R. S. Sterling, Governor of Texas, W. W. Sterling, Adjutant General of Texas and Jacob F. Wolters, Brigadier General Texas National Guard, from which order granting such interlocutory injunction the defendants named have appealed to the Supreme Court of the United States; with the approval of the Court, make and enter into the following stipulation:

1. There shall be a severance of the plaintiffs' alleged causes of action; and the alleged cause of action against

[fol. 3] R. S. Sterling, Governor of Texas, W. W. Sterling, Adjutant General of Texas, and Jacob F. Wolters, Brigadier General Texas National Guard, shall be tried as against them separate and apart from the trial of the plaintiffs' alleged cause of action against all of the other defendants. The case shall proceed to trial on existing pleadings as against defendants R. S. Sterling, Governor of Texas, W. W. Sterling, Adjutant General of Texas, and Jacob F. Wolters, Brigadier General Texas National Guard, as though no other parties were named in said pleadings and a final judgment shall be entered as between plaintiffs and the said R. S. Sterling, Governor of Texas, W. W. Sterling, Adjutant General of Texas and Jacob F. Wolters, Brigadier General Texas National Guard; and said case may then proceed to trial and final judgment as between the plaintiffs and all other parties named, the same as though the said R. S. Sterling, W. W. Sterling and Jacob F. Wolters were not named as parties in said pleading. It is the intention of the parties that the plaintiffs' suit against the defendants named in this paragraph shall be treated as a separate suit from the plaintiffs' suit against all other defendants the same as though the suits had been separately filed. It is the further intention of the parties that separate final judgments shall be entered as between the plaintiffs and R. S. Sterling, Governor of Texas, W. W. Sterling, Adjutant General of Texas and Jacob F. Wolters, Brigadier General Texas National Guard and as between the plaintiffs and all other parties named as defendants in this suit, and that the respective parties to the separate judgments may appeal separately from the respective judgments when entered.

2. The case as against the defendants R. S. Sterling, Governor of Texas, W. W. Sterling, Adjutant General of Texas and Jacob F. Wolters, Brigadier General Texas National Guard, is submitted on its merits to the Court aforesaid and the same shall be decided on the existing [fol. 4] pleadings and on the record of evidence introduced at the trial upon the application for an interlocutory injunction; the court shall enter final judgment as between the plaintiffs and the defendants R. S. Sterling, Governor of Texas, W. W. Sterling, Adjutant General of Texas and Jacob F. Wolters, Brigadier General Texas National Guard, and either or all of said parties may prosecute an

appeal from said judgment when so entered, the same as though the only parties defendants named in this suit were the ones whose names are specifically mentioned in this paragraph.

3. In the trial of the plaintiffs' alleged cause of action against the defendants other than those specifically named in the preceding paragraph, the record of evidence introduced on the hearing of the application for interlocutory injunction in this case may be used for all purposes by either the plaintiffs or the remaining defendants.

4. Plaintiffs do not desire to urge, but waive all claims and alleged claims for damages pleaded or set forth in their pleadings in this case against R. S. Sterling, Governor of Texas, W. W. Sterling, Adjutant General of Texas and Jacob F. Wolters, Brigadier General Texas National Guard.

5. In any appeal from the final judgment as between the plaintiffs and the defendants specifically named in this stipulation, either or any of the parties to such final judgment so appealing may use the transcript of the record now on file in the office of the Clerk of the Supreme Court of the United States in cause No. 746, R. S. Sterling, Governor of the State of Texas, etc. et al., appellants vs. E. Constantin, et al., appellees, as the record on appeal from the final order entered as between the plaintiffs and the defendants herein specifically named; and the party or parties so appealing from such final order may, in addition to said record now on file in the office of the Clerk of the [fol. 5] Supreme Court of the United States take up as additional parts of said record this stipulation, the final judgment of the court, such bonds and other parts of the record as the appealing party may desire. It is further stipulated between the parties that the record now on file in the office of the Clerk of the Supreme Court of the United States in the above entitled and numbered cause, being the appeal from the order granting the interlocutory injunction, is a true and correct transcript of the record on the appeal from the order granting the interlocutory injunction.

6. It is stipulated between the plaintiffs and the other parties to this suit that any appeal from a final judgment as

between the plaintiffs and the defendants specifically named in this stipulation, that such appeal from such final order shall be consolidated in the Supreme Court of the United States with the appeal which has been taken and is now pending in the Supreme Court of the United States from the interlocutory injunction order heretofore granted.

Jos. W. Bailey, Jr., Luther Nickels, by J. W. B., Jr., Attorneys for Plaintiffs; James V. Allred, Attorney General of Texas, by Fred Upchurch, Assistant Attorney General of Texas, Attorneys for Defendants Other Than R. S. Sterling, W. W. Sterling, and Jacob F. Wolters. Dan Moody, E. F. Smith, Attorneys for Defendants R. S. Sterling, W. W. Sterling, and Jacob F. Wolters.

Approved.

J. C. Hutcheson, Jr., Judge Circuit Court United States for the Fifth Circuit. Randolph Bryant, District Judge. W. I. Grubb, District Judge.

[File endorsement omitted.]

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO EVIDENCE TO BE INCLUDED IN THE RECORD—Filed Oct. 1, 1932

It is agreed by and between attorneys for Plaintiffs and attorneys for the Defendants, R. S. Sterling, Jacob F. Wolters, and W. W. Sterling, as follows:

1. In accordance with a stipulation between the parties filed in this cause at the time said cause came on for trial on its merits, it is here agreed and stipulated that the printed transcript of the record in this cause, now on appeal in the Supreme Court of the United States from the temporary injunction heretofore granted in this cause, being cause No. 746, R. S. Sterling, Governor of the State of Texas, et al, vs. E. Constantin, et al, on the docket of the Supreme Court of the United States, contains a true and correct statement

of all substantial and material evidence given on the hearing of this cause before the three-judge court constituted and organized as provided by Section 266 of the Judicial Code at the time this case was tried on its merits.

[fol. 7] 2. That all of the testimony included in the above mentioned statement of the evidence is necessary to a proper determination of this case on appeal.

3. In accordance with the stipulation and agreement filed in this cause at the time this cause was tried on its merits, it is here agreed that the transcript of the record of all pleadings and the evidence now on file in the Supreme Court of the United States on the appeal of the Defendants herein from the interlocutory injunction heretofore granted shall be and does constitute a full and complete record and transcript of all proceedings had, including pleadings and evidence, before the three-judge court at the time this cause was tried on its merits.

4. In accordance with the stipulation and agreement of the parties heretofore filed in this cause at the time this cause was tried on its merits, it is here stipulated and agreed that it shall not be necessary for Defendants to bring forward and file in the Supreme Court of the United States, in perfecting their appeal, a transcript of the pleadings and the evidence upon which this case was tried, for the reason that it is now on file in the Supreme Court of the United States on Defendants' appeal from the interlocutory injunction heretofore granted in this cause, being cause No. 746, R. S. Sterling, Governor of the State of Texas, et al, vs. E. Constantin, et al, on the docket of the Supreme Court of the United States; but that this appeal on the merits shall be consolidated with the Defendants' appeal from the temporary injunction, and the same transcript of record used on the consolidated appeal as is now on file on Defendants' appeal from said interlocutory injunction.

5. The stipulation and agreement between the parties filed in this cause at the time said cause was tried on its merits was approved by the court and each judge thereof, and in said stipulation and agreement it was expressly agreed that either or any of the parties to the final judgment entered in said cause who may appeal therefrom may use the transcript of record now on file in the office of the

Clerk of the Supreme Court of the United States in cause [fol. 8] No. 746, R. S. Sterling, Governor of the State of Texas, et al, Appellants, vs. E. Constantin, et al, Appellees, as the record on appeal from the final order entered as between Plaintiffs and Defendants herein specifically named. It is, therefore, agreed and stipulated that there is no necessity for the court approving for a second time the statement of facts in this cause, said statement of facts having been heretofore approved by the court; and, that therefore, there is no necessity for notice to Plaintiffs of lodgment and time and notice of place when Defendants will ask the court to approve the statement of facts in this cause; and if there should be any such necessity, then and in that event, Plaintiffs do hereby waive the issuance and service of notice of lodgment and time and notice of place when Defendants will ask the court to approve the statement of facts in this cause. And the respective parties, by their counsel, agree that the statement of facts as contained in the transcript of record hereinbefore mentioned and now on file with the Clerk of the Supreme Court of the United States is a true and correct statement of all substantial and material evidence given on a hearing of this cause, and that there is no necessity for the filing of said statement of facts with the Clerk of this court, and if there be such necessity, then the same is hereby in all things waived by both Plaintiffs and Defendants, it being expressly stipulated and agreed that the transcript of record, including the pleadings and the evidence, above mentioned and now on file with the Clerk of the Supreme Court of the United States, be and the same is hereby incorporated in the record for the purposes of appeal to the Supreme Court of the United States for all purposes, and that the same, taken together with the matters mentioned in the agreement as to documents which shall constitute the record on appeal filed herein, shall constitute [fol. 9] a full and complete record for the purposes of appeal to the Supreme Court of the United States.

Luther Nickels, Jos. W. Bailey, Jr., Attorneys for Plaintiffs. Dan Moody, E. F. Smith, Attorneys for Defendants, R. S. Sterling, Jacob F. Wolters, and W. W. Sterling.

The foregoing stipulation filed in the above entitled cause has been submitted to and examined by us, and we have

also examined the statement of the evidence as contained in the transcript of record now on file in the office of the Clerk of the Supreme Court of the United States in Cause No. 746, R. S. Sterling, Governor of the State of Texas, et al., Appellants, vs. E. Constantin, et al., Appellees; and said stipulation has been found by us to be in accordance with that certain stipulation and agreement filed by the parties in this cause at the time the same came on for hearing on its merits, and the statement of the evidence as contained in said printed transcript of record has been found by us to be correct, and is by us approved as contained all substantial and material portions of evidence given, heard and considered at the time the above entitled cause was tried on its merits before the three-judge court constituted and organized as provided by Section 266 of the Judicial Code.

Dated September 30th, 1932.

J. C. Hutcheson, Jr., U. S. Circuit Judge. W. I. Grubb, U. S. District Judge, by J. C. H., Jr. Randolph Bryant, U. S. District Judge, by J. C. H., Jr.

[File endorsement omitted.]

[fol. 10] In United States District Court for the Eastern District of Texas, Tyler Division

In Equity. No. 365.

E. Constantin et al.,

vs.

Lon Smith et al.

Judgment—Filed Oct. 1, 1932

On the nineteenth day of September, A. D. 1932, this suit came on to be heard on the merits of complainants' bill and prayer for permanent injunction and for final decree and judgment as between complainants and the respondents, R. S. Sterling, Governor of Texas; W. W. Sterling, Adjutant General of Texas; and Jacob F. Wolters, Brigadier General, Texas National Guard. By stipulation of parties

filed in this suit it was stipulated and agreed that complainants' cause of action as against the respondents, R. S. Sterling, Governor of Texas; W. W. Sterling, Adjutant General of Texas; and Jacob F. Wolters, Brigadier General Texas National Guard, should be tried separately and apart from the trial of complainants' alleged cause of action against all of the other respondents, and that the suit should proceed to trial and final judgment as between complainants and the respondents above named the same as though there were no other parties mentioned in the pleadings; and that either the complainants or the respondents above named, one or all, might appeal from such judgment. It was stated by complainants that they did not desire to urge, but waived all claims and alleged claims for damages pleaded or set forth in their pleadings in this suit against R. S. Sterling, Governor of Texas; W. W. Sterling, Adjutant General of Texas; and Jacob F. Wolters, Brigadier General, Texas National Guard; and it was thereupon [fol. 11] stipulated between the complainants and the respondents named that the complainants should waive, and the complainants did then waive and abandon all of their claims and alleged claims for damages against R. S. Sterling, Governor of Texas; W. W. Sterling, Adjutant General of Texas; and Jacob F. Wolters, Brigadier General, Texas National Guard.

It was further agreed and stipulated that this suit as between the complainants and the respondents, R. S. Sterling, Governor of Texas; W. W. Sterling, Adjutant General of Texas; and Jacob F. Wolters, Brigadier General, Texas National Guard, should be submitted on its merits and for final decree and judgment to the Court without a jury, and that the same should be submitted to the Court and decided by the Court on the existing pleadings and on the record of the evidence introduced at the hearing and trial of the complainants' application for an interlocutory injunction. It appeared to the Court that said stipulations and agreements were fair and necessary to a prompt trial of this suit on its merits and that the same were necessary in order that a final decree and judgment might be entered in this suit, and the same were sanctioned and approved by this Court.

The suit was so presented, submitted and heard by a statutory Court composed of three Judges, that is, The

Honorable Joseph C. Hutcheson, Jr., Circuit Judge in and for the Fifth District; The Honorable William I. Grubb, United States District Judge for the Northern District of Alabama; and The Honorable Randolph Bryant, United States District Judge for the Eastern District of Texas; and the Court, after hearing the pleadings, the evidence and argument of counsel, is of the opinion that the injunctive relief prayed for by complainants against the respondents R. S. Stering, Governor of Texas; W. W. Sterling, Adjutant General of Texas; and Jacob F. Wolters, Brigadier General, Texas National Guard, should be granted.

[fol. 12] It is accordingly, on this the nineteenth day of September, A. D., 1932, ordered, adjudged, and decreed by this Court that the respondents, R. S. Sterling, Governor of Texas; W. W. Sterling, Adjutant General General of Texas; and Jacob F. Wolters, Brigadier General, Texas National Guard, and all other persons acting for or with or under the direction of them, be, and they are hereby, permanently enjoined from enforcing against complainants any of their so-called military or executive orders, passed or to be passed, regulating or restricting the production of oil from the oil wells of complainants described in their bill of complaint, or from in any manner, directly or indirectly, interfering with the lawful production of oil from complainants' said oil wells.

The Clerk of the United States District Court for the Eastern District of Texas will issue writs in accordance with this decree.

It is further ordered, adjudged, and decreed in accordance with the stipulation hereinabove mentioned, that complainants recover nothing in the way of damages as against the said R. S. Sterling, W. W. Sterling, or Jacob F. Wolters, or either of them.

It is further ordered, adjudged, and decreed that complainants do have and recover of the last mentioned respondents their costs in this behalf incurred, for all of which writ of execution may issue.

J. C. Hutcheson, Jr., U. S. Circuit Judge. W. I. Grubb, U. S. District Judge. Randolph Bryant, U. S. District Judge.

O. K. Dan Moody.
O. K. Jos. W. Bailey, Jr.

[File endorsement omitted.]

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed Oct. 1, 1932.

Your Petitioners, R. S. Sterling, Jacob F. Wolters, and W. W. Sterling, Defendants in the above entitled cause, respectfully represent and show that in said cause pending in the United States District Court for the Eastern District of Texas, Tyler Division, there was entered on the 19th day of September, 1932, a decree, judgment or order, final in its nature, granting Plaintiffs a permanent injunction as prayed for in their complaint in said suit as against these Defendants. Said cause was heard and determined on its merits by a three-judgment court, in accordance with the provisions of Section 266 of the Judicial Code. Your Petitioners, conceiving themselves aggrieved, injured and prejudiced by said decree, order and judgment, which is believed by them to be erroneous and inequitable, hereby appeal from said decree, order or judgment to the Supreme Court of the United States, and they pray that their ap-
[fol. 14] peal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree, order or judgment was made, duly authenticated, may be sent to the Supreme Court of the United States, and the proper order touching the security required of your Petitioners be made.

And, now, at the time of the filing of this petition for appeal, your Petitioners file an Assignment of Errors setting up separately and particularly each error asserted and intended to be urged in the Supreme Court of the United States.

Wherefore said R. S. Sterling, Jacob F. Wolters and W. W. Sterling, Defendants and Appellants, pray that their appeal be allowed.

Dan Moody, E. F. Smith, Attorneys for R. S. Sterling, Jacob F. Wolters, and W. W. Sterling, Defendants and Appellants.

And now, to-wit, on the 30th day of September, 1932, at Tyler, it appearing to the court that the above named De-

fendants and Appellants have filed an Assignment of Errors and have filed a good and sufficient appeal bond in the required amount, which bond has this day been approved by us, it is ordered that the appeal prayed for in the foregoing petition be and the same is hereby allowed as therein prayed for.

J. C. Hutcheson, Jr., United States Circuit Judge.
W. I. Grubb, United States District Judge, by J. C. H., Jr.
Randolph Bryan, United States District Judge, by J. C. H., Jr.

[File endorsement omitted.]

[fols. 15-17] Bond on appeal for $1,000, approved and filed October 1, 1932, omitted in printing.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Oct. 1, 1932

And, now, at the time of filing their petition for appeal, and the allowance thereof, come R. S. Sterling, Jacob F. Wolters and W. W. Sterling, three of the Defendants and Appellants, and make and file their Assignment of Errors as follows:

I

The court erred in finding that it had jurisdiction to hear, determine and grant the injunction against these Defendants, the Governor of Texas, the Commanding Officer of the military forces of the State of Texas, and the Adjutant General of the State of Texas.

[fol. 19] II

The court erred in finding that it had jurisdiction to inquire into and determine whether, as a matter of fact, an insurrection or riot, or imminent danger thereof, existed in the Counties of Gregg, Upshur, Rusk and Smith, in the

State of Texas, at a time when the Governor of Texas, in the exercise of his discretion and judgment, had determined that an insurrection and riot, or imminent danger thereof, did exist, and had by proclamation declared Martial Law, which was in force and effect at the time of the hearing and decision of this case, and which was declared for the purpose of suppressing and preventing insurrection and riot in said Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas.

III

The court erred in finding that the evidence showed no insurrection or riot existed in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, on August 16, 1931, or on October 13, 1931, or at the time this cause was heard and decided by this court.

IV

The court erred in finding that there was no warrant in the evidence for the belief, on the part of the Defendants and Appellants, R. S. Sterling and Jacob F. Wolters, that there was imminent danger of insurrection or riot in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, on August 16, 1931, or on October 13, 1931, or at the time this case was heard and decided by this court.

V

The court erred in finding that the Defendant and Appellant, R. S. Sterling, as Governor of Texas, had ousted the Railroad Commission of the State of Texas from the exercise of its jurisdiction in the matter of enforcing the conservation laws of the State of Texas, as applied to the production of crude petroleum.

[fol. 20]

VI

The court erred in finding that the Defendant and Appellant, R. S. Sterling, as Governor of the State of Texas, had no authority under the Constitution and laws of the State of Texas to declare Martial Law.

VII

The court erred in finding that the restriction placed by the Governor upon the production of crude petroleum by

the Plaintiffs, during the existence of Martial Law under the Constitution and statutes of Texas, as a means of preventing and suppressing insurrection and riot, or imminent danger thereof, was a taking of the Plaintiffs' property or a trespass upon the property rights of the Plaintiffs, in violation of the 14th Amendment to the Constitution of the United States.

VIII

The court erred in finding that this suit, insofar as it is against these Defendants and Appellants in their official capacities, as Governor of the State of Texas, as Adjutant General of the State of Texas, and as Commanding Officer of the military forces during martial law, was not a suit against the State of Texas.

IX

The court erred in granting the injunction against these Defendants and Appellants, enjoining them, and each of them, in their official capacity, from interfering with the production of oil by Plaintiffs from land situated in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, at a time when, according to the judgment and discretion exercised by the Defendant and Appellant, R. S. Sterling as Governor of the State of Texas, there was insurrection, riot and tumult, and imminent danger thereof, in said counties, and at a time when by proclamation of the Governor martial law was being maintained and enforced in said counties.

X

The court erred in granting the injunction as against these Defendants and Appellants, and as against each of [fol. 21] them, because the judgment, order or decree of the court, granting such permanent injunction, is without support, either in the facts or by the law of this case.

XI

The court erred in holding that it had jurisdiction to review, inquire into, and control by injunction the means employed by the Defendant and Appellant, R. S. Sterling as Governor of Texas, under Martial Law, to suppress the insurrection and riot, and imminent danger thereof, found and declared by him to exist in his proclamation declaring

Martial Law, in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, and in substituting its judgment and discretion for that of the Governor of Texas in determining the means to be employed under Martial Law to suppress the riot and insurrection, and imminent danger thereof, found to exist in the proclamation declaring Martial Law.

XII

For which errors found in the record and because of each of them, the above named persons in their official capacities, Defendants in the trial court, now Appellants, pray for a reversal of the decree, judgment or order of the District Court of the United States for the Eastern District of Texas, which was entered in this cause, granting a permanent injunction against these Appellants upon the authority of a three-judge court constituted and organized as provided and authorized by Section 266 of the Judicial Code; and the Appellants pray for such other relief as they may be entitled to receive.

Dan Moody, E. F. Smith, Attorneys for R. S. Sterling, Jacob F. Wolters, and W. W. Sterling, Defendants and Appellants.

[File endorsement omitted.]

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

WAIVER OF CITATION—Filed Oct. 1, 1932

Defendants, R. S. Sterling, Jacob F. Wolters, and W. W. Sterling, having filed their Assignment of Errors, Petition for Appeal, and Appeal Bond, and having been allowed an appeal to review the above entitled cause in the Supreme Court of the United States, Plaintiffs in said cause, by their attorney, do hereby waive the issuance and service of citation herein, and said attorney does enter his appearance in the Supreme Court of the United States.

Dated this 30th day of September, 1932.

E. Constantin, J. D. Wrather, Plaintiffs, by Jos. W. Bailey, Jr., Their Attorney.

[File endorsement omitted.]

[fol. 23] IN UNITED STATES DISTRICT COURT

[Title omitted]

AGREEMENT AS TO DOCUMENTS WHICH SHALL CONSTITUTE THE RECORD ON APPEAL—Filed Oct. 1, 1932

The parties hereto, waiving præcipe, have agreed that the following documents shall constitute the record on appeal from the permanent injunction granted in this cause against Defendants on the trial of said cause on its merits:

1. Each and every document, including the statement of facts, which appears in the printed transcript of the record now on file in the office of the Clerk of the Supreme Court of the United States in Cause No. 746, R. S. Sterling, Governor of the State of Texas, et al., Appellants, vs. E. Constantin et al., which printed transcript of record contains the following documents:

a. Plaintiffs' Original Bill.

b. Plaintiffs' First Amended Original Bill.

c. Plaintiffs' Supplemental Bill.

[fol. 24] d. Plaintiffs' First Supplemental Petition responding to matters and things stated and averred in the answer filed by the defendants.

e. Answer of the Defendants, R. S. Sterling, Jacob F. Wolters and W. W. Sterling, to the First Amended Original Petition and Bill of Complaint of Plaintiffs.

f. Answer of Defendants, C. V. Terrell, Lon A. Smith, and Pat M. Neff, to Plaintiffs' First Amended Original Petition and Bill of Complaint.

g. Amendment to Answers of defendants, R. S. Sterling, Jacob F. Wolters and W. W. Sterling.

h. Decree of the court granting interlocutory injunction.

i. Opinion of the court authorizing the granting of the interlocutory injunction.

j. Statement of evidence on appeal.

k. Assignment of Errors.

l. Petition for Appeal and allowance thereof.

m. Appeal Bond.

n. Motion of Defendants R. S. Sterling, Jacob F. Wolters and W. W. Sterling for stay of injunction pending appeal.

o. Agreement as to papers composing the record.
p. Waiver of citation on appeal.
q. Cost Bill.
r. Certificate of the Clerk.

2. Decree of the court granting permanent injunction.

3. Opinion of the court authorizing the granting of the permanent injunction.

4. Assignment of Errors.

5. Petition for Appeal and allowance thereof.

6. Appeal Bond.

7. Stipulation of the parties, approved by the court, agreeing that this appeal from the permanent injunction may be consolidated in the Supreme Court of the United States with Defendants' appeal from the interlocutory injunction in this cause, which latter mentioned appeal is [fol. 25] now pending in said the Supreme Court of the United States.

8. Stipulation as to evidence to be included in the record.

9. Agreement as to papers composing the record.

10. Waiver of Citation on appeal.

11. Cost Bill.

12. Certificate of the Clerk.

Dan Moody, E. F. Smith, Attorneys for Defendants and Appellants, R. S. Sterling, Jacob F. Wolters, and W. W. Sterling. Luther Nickels, Jos. W. Bailey, Jr., Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 26] In Supreme Court of the United States

[Title omitted]

Statement of Points Relied on by Appellants and Designation to Print Entire Record—Filed Oct. 17, 1932

The Appellants on this appeal will rely on the following points:

Point 1. It was an abuse of judicial discretion for the three-judge court, on the trial of this cause on its merits, to

grant a permanent injunction enjoining the Governor of the State of Texas, during the existence of insurrection and riot, and imminent danger thereof, in the East Texas oil field, from interfering with Appellees' production of oil from their oil wells, when the Governor had found and declared that during the emergency created by the riot and imminent danger thereof that it was necessary in order to suppress and prevent insurrection and riot, that production of oil be restricted from all wells in the East Texas field, including those of Appellees.

[fol. 27] Point 2. The court had no jurisdiction to review, inquire into and control by injunction the means employed by Appellant R. S. Sterling as Governor of Texas under Martial Law to suppress the insurrection and riot, and imminent danger thereof, found and declared by him to exist in his proclamation declaring Martial Law in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas.

Point 3. The suit is against R. S. Sterling in his official capacity as Governor of the State of Texas, W. W. Sterling in his official capacity as Adjutant General of the State of Texas, and Jacob F. Wolters in his official capacity as Commanding Officer of the military forces in the field, and is for the purpose of restraining them from taking action found by the Governor to be necessary in order to suppress and prevent insurrection and riot, and is in fact and in law a suit against the State of Texas, without its consent, and in violation of the 11th Amendment to the Constitution of the United States.

Point 4. The evidence—and it is not controverted—establishes the fact of insurrection and riot, or at least imminent danger thereof.

We ask that the entire record be printed.

Dan Moody, E. F. Smith, Attorneys for Appellants.

We have on this the 26th day of September, 1932, mailed by Registered Mail from Austin, Texas, to Joseph W. Bailey, Jr., Esquire, Dallas, Texas, attorney of record for Appellees, a true and correct copy of the statement of points which will be relied upon by Appellants in this cause.

Dan Mood, E. F. Smith, Attorneys for Appellants.

[File endorsement omitted.]

[fols. 28 & 29] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 37,150. E. Texas D. C. U. S. Term No. 453. R. S. Sterling, Governor of the State of Texas, et al., appellants, vs. E. Constantin et al. Filed October 17, 1932. File No. 37,150.

(2583)

FILE COPY

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CHARLES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. [redacted] 11

No._____

R. S. STERLING, GOVERNOR OF TEXAS, ET AL,
Appellants,

vs.

E. CONSTANTIN, ET AL,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

MOTION TO CONSOLIDATE THE TWO APPEALS AND TO ADVANCE THE CONSOLIDATED CAUSE ON THE CALENDER.

DAN MOODY,
E. F. SMITH,
Solicitors for Appellants.
JOS. W. BAILEY, JR.,
Solicitor for Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 746

No.----------

R. S. STERLING, GOVERNOR OF TEXAS, ET AL,
Appellants,

VS.

E. CONSTANTIN, ET AL,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

MOTION TO CONSOLIDATE THE TWO APPEALS AND TO ADVANCE THE CONSOLIDATED CAUSE ON THE CALENDER.

Hon. R. S. Sterling, Governor of the State of Texas, in a formal proclamation of Martial Law, declared a state of insurrection, riot, tumult and breach of peace to exist in four counties in the State of Texas, and directed the Appellant, Hon. Jacob F. Wolters, Brigadier General Texas National Guard, to assume supreme command of the situa-

tion and to take such steps as he may deem necessary to enforce and uphold the majesty of the law, subject to the orders of the Governor.

Thereafter, in a subsequent order, the Governor directed the Appellant, General Jacob F. Wolters, to limit the production of oil in the four counties to one hundred barrels of oil per day per well. In this connection the Governor declared in said order:

"I believe that it is necessary, as a precaution against acts of insurrection, riot, breach of peace, tumult and general disorder, of which there is imminent danger in the aforesaid counties, and that it is a proper measure and the only means at my command to suppress the existing insurrection in said counties and prevent further acts of insurrection, riot, tumult, breach of peace and general disorder in said counties, and to remove the existing imminent danger of such unlawful acts in said counties, for me to cause oil production from each well in said counties to be limited and restricted for the present to 100 barrels of oil per day."

Appellees alleged in their petition that they owned four producing oil wells in the territory embraced within the Governor's declaration of martial law, and in this case sought an injunction against the Governor, General Wolters and General Sterling, Appellants herein, enjoining them and each of them from enforcing the orders of the Governor limiting the production of oil.

The case was first tried on Appellees' aplication for a temporary injunction before a three-judge court, organized as provided for by Section 266 of the Judicial Code (28 U. S. C. A. Section 380). A temporary injunction was granted and issued. From this temporary injunction Appellants heretofore, and at the 1931 term of the court, perfected their appeal to this Honorable Court. The case was not reached by this court during the 1931 term.

In the meantime, the case was tried on its merits before the three-judge court organized as hereinabove set forth, and as a result of that trial a permanent injunction was granted against the Appellants. Both the temporary and permanent injunctions expressly provided that Hon. R. S. Sterling, Governor of Texas, Hon. W. W. Sterling, Adjutant General of the State of Texas, and Hon. Jacob F. Wolters, Brigadier General Texas National Guard, and all persons acting for or with or under the direction of them, be and they are hereby enjoined from enforcing against Complainants any of their so-called military or executive orders, passed or to be passed, regulating or restricting production of oil from the Complainants' wells, or from in any manner, directly or indirectly, interfering with the lawful production of oil from Complainants' property.

By stipulation between Appellees and Appellants, it was agreed at the time the case was tried on the merits that the case should be tried and decided on

the existing pleadings and on the record of evidence introduced at the trial upon the application for an interlocutory injunction. It was further stipulated that the record now on file in the office of of the Clerk of the Supreme Court of the United States in cause No. 746, R. S. Sterling, Governor of the State of Texas, etc. et al, Appellants, vs. E. Constantin et al, Appellees, is a true and correct transcript of the record on the appeal from the order granting the interlocutory injunction. It was further stipulated that in any appeal from the final judgment as between the Appellees and these Appellants, either or any of the parties to such final judgment so appealing may use the transcript of record now on file in the office of the Clerk of the Supreme Court of the United States in said cause No. 746, as the record on appeal from the final order entered as between the Appellees and these Appellants, and the party or parties so appealing from such final order may, in addition to said record now on file in the office of the Clerk of the Supreme Court of the United States, take up as additional parts of said record this stipulation, the final judgment of the court, such bonds and other parts of the record as the appealing party may desire. It was further stipulated between Appellees and Appellants that such appeal from such final order shall be consolidated in the Supreme Court of the United States with the appeal which has been taken and is now

pending in the Supreme Court of the United States from the interlocutory injunction order heretofore granted.

In this connection, the attention of the court is respectfully directed to the fact that Appellants have perfected an appeal from the final judgment of the court granting a permanent injunction and have, in addition to the record on file in this Honorable Court in said cause No. 746, brought up additional matters in accordance with a stipulation between the parties as to what the record on appeal from the permanent injunction should contain. This record is being printed and the printing will be completed at the time this motion is presented to the court.

The foregoing stipulation of the parties, made at the time this case was tried on the merits, was approved in all respects by each of the three judges presiding at the trial, and is a part of the printed record on appeal from the judgment or decree of the court granting the permanent injunction.

Heretofore, cause No. 746, being Appellants' appeal from the order of the court granting the temporary injunction, was set down for submission before this Honorable Court for October 14, 1932. At the time Appellants received notice that cause No. 746 had been so set down for submission, the case had been tried on its merits and a decree or judgment entered granting the permanent injunction, as hereinabove set forth. By telegrams, counsel for

Appellees and for Appellants advised the Clerk of this Honorable Court of this fact, and requested that submission of cause No. 746 be passed until the appeal from the permanent injunction was perfected. Appellants were advised by telegram from the Clerk that the Chief Justice of this Honorable Court had granted such request.

It is believed that the foregoing statement shows that this case is an emergency one, and because of its nature and importance is entitled to be advanced on the calendar of this Honorable Court.

WHEREFORE, Appellants pray that their appeal from the judgment or decree of the lower court granting a temporary injunction and their appeal from the decree or judgment of the lower court in the same case granting a permanent injunction be consolidated and tried before this Honorable Court as one case; and further pray and move the court to advance the cause as consolidated for hearing at the earliest time compatible with the other business of the court.

DAN MOODY,
E. F. SMITH,
Solicitors for Appellants.

I, Joseph W. Bailey, Jr., counsel for Appellees, hereby enter appearance herein in the Supreme Court of the United States, and request that the foregoing motion to consolidate and to advance be granted.

JOS. W. BAILEY, JR.,
Solicitor for Appellees.

Austin, Texas,
October 11, 1932.

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No. [redacted] 11

Supreme Court of the United States, October Term, 1931

R. S. STERLING, *Et Al., Appellants*

VS.

E. CONSTANTIN, *Et Al., Appellees*

STATEMENT OF BASIS ON WHICH APPELLANTS CONTEND THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE DECREE APPEALED FROM, AS REQUIRED BY SUPREME COURT RULE 12.

DAN MOODY,
E. F. SMITH,
Attorneys for Appellants.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1931

R. S. STERLING, *Et Al., Appellants*
VS.
E. CONSTANTIN, *Et Al., Appellees*

STATEMENT OF BASIS ON WHICH APPELLANTS CONTEND THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE DECREE APPEALED FROM, AS REQUIRED BY SUPREME COURT RULE 12.

Pursuant to Supreme Court Rule 12, part 1, R. S. Sterling, Jacob F. Wolters, and W. W. Sterling, appellants, file this their statement showing the basis on which said appellants contend that the Supreme Court has appellate jurisdiction to review on appeal the decree appealed from herein, as follows:

I.

The statutes believed to sustain appellate jurisdiction are Sections 238 and 266 of the Judicial Code (28 USCA, Secs. 345, 380). 28 USCA, Sec. 345 (Sec. 238, Judicial Code) provides that "a direct review by the Supreme Court of an interlocutory or final judgment or decree of a District Court may be had where it is so provided in .... Sec. 380 of this title."

28 USCA, Sec. 380 (Sec. 266, Judicial Code) provides that no interlocutory injunction shall be issued or granted "suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the act of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state . . . . unless the application for the same shall be presented to a Justice of the Supreme Court of the United States, or to a Circuit or District Judge, and it shall be heard and determined by three judges, of whom at least one shall be a Justice of the Supreme Court or a Circuit Judge. . . . " Said Section 380 also provides that "an appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case."

II.

The decree appealed from, after notice and hearing, before a three-judge court organized as provided by Section 266 of the Judicial Code (28 USCA, Sec. 380), was entered on the 26th day of February, 1932, as appears on Page . . . of the printed record herein.

III.

The application for an appeal was presented and allowed by the three judges constituting the court on the 26th day of February, 1932, as appears from Page . . . of the printed record herein.

IV.

The appeal herein is from a decree of the United States District Court for the Eastern District of Texas, said court at the time it made and caused to be entered said decree being a three-judge court organized and constituted as provided by Section 266 of the Judicial Code (28 USCA, Sec. 380), in a case of equity.

Said decree so made and caused to be entered, and which appellants desire this court to review, appears on Page ... of the printed record herein.

The original bill of complaint averred that certain oil and gas conservation statutes of the State of Texas, purporting to give authority to the Railroad Commission of the State of Texas, after notice and hearing, to make orders fixing the amount of oil and gas that an operator of an oil and gas well could produce, were invalid because in violation of the Constitution of the United States, and that said orders made by the Railroad Commission, fixing the amount of oil that complainants could produce, were likewise in violation of the Constitution of the United States.

Afterwards, by amended pleadings, the Governor of the State of Texas, Hon. R. S. Sterling, and the Adjutant General of the State of Texas, Hon. W. W. Sterling, were made parties defendant to this suit. Hon. Jacob F. Wolters, Brigadier General Texas National Guard, was an original party defendant to the suit.

By the amended pleadings it was averred, in addition to

averments contained in the original bill, that the defendant R. S. Sterling, Governor of Texas, had declared Martial Law in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, and, with the aid and assistance of Defendants W. W. Sterling, Adjutant General of the State of Texas, and Jacob F. Wolters, Commanding Officer of the Military forces in the above named counties, were taking the property of complainants without due process of law and in violation of the 14th Amendment to the Constitution of the United States, in this, that by force of arms complainants were compelled to restrict production of oil from their wells to 100 barrels of oil per day, when each of appellees' wells were capable of producing without physical waste 5,000 barrels of oil per day.

The original bill of complaint appears on Pages ... to ..., and the amended pleadings on Pages ... to ..., and Pages ... to ..., of the printed record herein.

According to the decree of the court, the appellants, R. S. Sterling, Governor of the State of Texas; W. W. Sterling, Adjutant General of the State of Texas; and Jacob F. Wolters, Commanding Officer of the Military forces of the State in the above named counties, "and all other persons acting for or with or under the direction of them, be and they are hereby enjoined from enforcing against complainants any of their so-called military or executive orders, passed or to be passed, regulating or restricting the production of oil from the complainants' wells, or from in any manner, directly or indirectly, interfering with the lawful production of oil from the complainants' property."

V.

The cases believed to sustain the jurisdiction of the Supreme Court are as follows:

Mathews vs. Rogers, 52 S. C. Rep. 217; Clark vs. Poor, 274 U. S. 554; Van Dyke vs. Geary, 244 U. S. 39; Railroad Co. vs. Garrett, 231 U. S. 298; Alabama vs. United States, 279 U. S. 229; Natural Fuel & Gas Co. vs. Public Service Commission, 278 U. S. 322; National Fire Ins. Co. vs. Thompson, 281 U. S. 331.

Respectfully submitted,

Dan Moody,

E. J. Smith,

Counsel for Appellants.

Service of a copy of the above statement is hereby admitted, this the 16th day of March, A. D. 1932.

JOS. W. BAILEY, JR.,
Attorney for Appellees.

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CHARLES ELMORE C

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 453

R. S. STERLING, GOVERNOR OF THE STATE OF TEXAS, ET AL., APPELLANTS,

vs.

E. CONSTANTIN ET AL.

STATEMENT AS TO JURISDICTION.

DAN MOODY,
E. F. SMITH,
Counsel for Appellants.

INDEX.

Subject Index.

Statement as to jurisdiction:	Page
Statutory provisions sustaining jurisdiction	1
Date of decree sought to be reviewed and date on which application for appeal was presented	2
Nature of the case and of the rulings	3
Cases believed to sustain jurisdiction	8

Table of Cases Cited.

Alabama v. United States, 279 U. S. 229	8
Clark v. Poor, 274 U. S. 554	8
Mathews v. Rogers, 52 Sup. Ct. Rep. 217	8
National Fire Ins. Co. v. Thompson, 281 U. S. 331	9
Natural Fuel & Gas Co. v. Public Service Commission, 278 U. S. 322	8
Railroad Co. v. Garrett, 231 U. S. 298	8
Sterling, etc., et al. v. Constantin et al., No. 11, October Term, 1932	5, 6, 7
Van Dyke v. Geary, 244 U. S. 39	8

Statutes Cited.

Constitution of the United States, 14th Amendment	3, 4
Judicial Code, Section 238 (U. S. C. A., Title 28, Section 345)	1
Judicial Code, Section 266 (U. S. C. A., Title 28, Section 380)	1, 2, 3

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 453

R. S. STERLING, GOVERNOR OF THE STATE OF TEXAS, ET AL., APPELLANTS,

vs.

E. CONSTANTIN ET AL., APPELLEES.

STATEMENT AS TO JURISDICTION.

Pursuant to Supreme Court Rule 12, Part 1, R. S. Sterling, Governor of Texas, Jacob F. Wolters and W. W. Sterling, Appellants, file this their statement showing the basis on which said Appellants contend that the Supreme Court has appellate jurisdiction to review on appeal the decree appealed from herein as follows:

I.

The statutes believed to sustain appellate jurisdiction are Sections 238 and 266 of the Judicial Code (28 U. S. C. A., Sections 345, 380). 28 U. S. C. A., Sec-

tion 345 (Section 238 Judicial Code) provides that "a direct review by the Supreme Court of an interlocutory or final judgment or decree of a District Court may be had where it is so provided in * * * Section 380 of this title."

28 U. S. C. A., Section 380 (Section 266 Judicial Code), provides that no interlocutory injunction shall be issued or granted "suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the act of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State * * * unless the application for the same shall be presented to a Justice of the Supreme Court of the United States, or to a Circuit or District Judge, and it shall be heard and determined by three judges, of whom at least one shall be a Justice of the Supreme Court or a Circuit Judge * * *." Said Section 380 also provides that "a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

II.

The decree appealed from was made and entered by a three-judge court, organized as provided by Section 266 of the Judicial Code (28 U. S. C. A., Sec. 380), on the 1st day of October, 1932, and appears on pages 7 *et seq.* of the printed record herein.

III.

The application for an appeal was presented to and allowed by the three judges constituting the court on the 30th day of September, 1932, as appears from page 10 of the printed record herein.

IV.

The appeal herein is from a decree of the United States District Court for the Eastern District of Texas, said court at the time it made and caused to be entered said decree being a three-judge court organized and constituted as provided by Section 266 of the Judicial Code (28 U. S. C. A., Sec. 380) in a case of equity. Said decree so made and caused to be entered, which Appellants desire this Court to review, appears on pages 7 *et seq.* of the printed record herein.

The original bill of complaint avers that certain oil and gas conservation statutes of the State of Texas, purporting to give authority to the Railroad Commission of the State of Texas, after notice and hearing, to make orders fixing the amount of oil and gas that an operator of an oil and gas well could produce, were invalid because in violation of the Constitution of the United States, and that said orders made by the Railroad Commission, fixing the amount of oil that complainants could produce, were likewise in violation of the Constitution of the United States.

Afterwards, by amended pleadings, the Governor of the State of Texas, Hon. R. S. Sterling, and the Adjutant General of the State of Texas, Hon. W. W.

Sterling, were made parties defendant to this suit. Hon. Jacob F. Wolters, Brigadier General Texas National Guard, was an original party defendant to the suit. By these amended pleadings it was further averred by the complainants that the statutes of the State of Texas authorizing the Governor to use military force to suppress insurrection, riot and breach of peace were unconstitutional, in this, that said statutes were in violation of the Constitution of the United States.

By amended pleadings it was further averred, in addition to averments contained in the original bill, that the defendant R. S. Sterling had declared martial law in the counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, and, with the aid and assistance of Defendants W. W. Sterling, Adjutant General of the State of Texas, and Jacob F. Wolters, commanding officer of the military forces in the above named counties, were taking the property of complainants without due process of law, and in violation of the 14th Amendment to the Constitution of the United States, in this, that by force of arms complainants were compelled to restrict production of oil from their wells to 100 barrels of oil per day, when each of appellees' wells were capable of producing without physical waste 5,000 barrels of oil per day.

According to the decree of the court, the appellants, R. S. Sterling, Governor of the State of Texas; W. W. Sterling, Adjutant General of the State of Texas, and Jacob F. Wolters, commanding officer of the military forces in the above named counties, "and all other

persons acting for or with or under the direction of them, be, and they are hereby permanently enjoined from enforcing against complainants any of their so-called military or executive orders, passed or to be passed, regulating or restricting the production of oil from the oil wells of complainants described in their bill of complaint, or from in any manner, directly or indirectly, interfering with the lawful production of oil from complainants' said oil wells."

Prior to the time this case was tried on its merits and the permanent injunction granted as aforesaid, the case had been tried, after notice of hearing, upon appellees' application for a temporary injunction, and a temporary injunction was granted, from which decree granting the temporary injunction appellants did, at the 1931 term, perfect an appeal to this Honorable Court, said appeal being Cause No. 746, now No. 11, October Term, 1932, R. S. Sterling, Governor of Texas, *et al. vs.* E. Constantin *et al.*, which appeal is now pending in this Court. At the time this case was tried on the merits by the court below, the parties entered into a stipulation in writing, which stipulation was approved by each of the three judges of the court below, to the effect that this case "is submitted on its merits to the court aforesaid, and the same shall be decided on the existing pleadings and on the record of evidence introduced at the trial upon the application for an interlocutory injunction." The stipulation further provided that "in any appeal from the final judgment as between the plaintiffs and the defendants specifically named in this stipulation, either

or any of the parties to such final judgment so appealing may use the transcript of record now on file in the office of the Clerk of the Supreme Court of the United States, in Cause No. 11, R. S. Sterling, Governor of the State of Texas, etc., *et al.*, Appellants, *vs.* E. Constantin *et al.*, Appellees, as the record on appeal from the final order entered as between the plaintiffs and the defendants herein specifically named; and the party or parties so appealing from such final order may, in addition to said record now on file in the office of the Clerk of the Supreme Court of the United States, take up as additional parts of said record this stipulation, the final judgment of the court, such bonds and other parts of the record as the appealing party may desire." The stipulation further provided "that such appeal from such final order shall be consolidated in the Supreme Court of the United States with the appeal which has been taken and is now pending in the Supreme Court of the United States from the interlocutory injunction order heretofore granted". This stipulation appears on pages 1 *et seq.* of the printed record herein.

In the stipulation as to evidence to be included in the record on appeal in this case, it is provided that "in accordance with the stipulation and agreement filed in this cause at the time this cause was tried on its merits, it is here agreed that the transcript of the record of all pleadings and the evidence now on file in the Supreme Court of the United States on the appeal of the defendants herein from the interlocutory injunction heretofore granted shall be and does con-

stitute a full and complete record and transcript of all proceedings had, including pleadings and evidence, before the three-judge court at the time this cause was tried on its merits." This stipulation further provides "that it shall not be necessary for defendants to bring forward and file in the Supreme Court of the United States, in perfecting their appeal, a transcript of the pleadings and the evidence upon which this case was tried, for the reason that it is now on file in the Supreme Court of the United States on defendants' appeal from the interlocutory injunction heretofore granted in this cause, being Cause No. 11, R. S. Sterling, Governor of the State of Texas, *et al. vs.* E. Constantin *et al.*, on the docket of the Supreme Court of the United States." This stipulation further provides "that this appeal on the merits shall be consolidated with the defendants' appeal from the temporary injunction, and the same transcript of record used on the consolidated appeal as is now on file on defendants' appeal from the interlocutory injunction." This stipulation appears on pages 4 *et seq.* of the printed record herein.

In the agreement as to the documents which shall constitute the record on appeal in this case (pages 15 *et seq.* of the printed record herein), it is agreed "that the following documents shall constitute the record on appeal from the permanent injunction granted in this cause against defendants on the trial of said cause on its merits:

> "1. Each and every document, including the statement of facts, which appears in the printed

transcript of the record now on file in the office of the Clerk of the Supreme Court of the United States, in Cause No. 11, R. S. Sterling, Governor of the State of Texas, *et al.*, Appellants, *vs.* E. Constantin *et al.*, which printed transcript of record contains the following documents * * *"

Then follows a description of the documents included in the printed record on appeal in said cause No. 11, and this is followed by a statement of the documents to be included in the transcript on appeal from the permanent injunction.

The three preceding paragraphs are explanatory of why reference will hereinafter be made to the printed record on appeal (Cause No. 11) from the interlocutory injunction granted in this case.

The original bill of complaint appears on pages 1 to 19, and appellees' amended pleadings appear on pages 19 to 49, and appellees' first supplemental petition responding to defendants' answer appears on pages 49 to 55 of the printed record in said Cause No. 11, being the printed record on appeal from the interlocutory injunction granted in this case.

V.

The cases believed to sustain the jurisdiction of the Supreme Court are as follows:

Mathews v. *Rogers*, 52 S. C. Rep. 217; *Clark* v. *Poor*, 274 U. S. 554; *Van Dyke* v. *Geary*, 244 U. S. 39; *Railroad Co.* v. *Garrett*, 231 U. S. 298; *Alabama* v. *United States*, 279 U. S. 229; *Natural Fuel & Gas Co.* v. *Public*

Service Commission, 278 U. S. 322; *National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331.

Respectfully submitted,

DAN MOODY,
E. F. SMITH,
Counsel for Appellants.

This is to certify that on October 14, 1932, I mailed by registered mail from Austin, Texas, to Joseph W. Bailey, Jr., attorney for appellees, to his office address in Dallas, Texas, a typewritten carbon copy of the above and foregoing document.

E. F. SMITH,
Attorney for Appellant.

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. [redacted]6 11

R. S. STERLING, Governor of Texas, ET AL.,
Appellants,

vs.

E. CONSTANTIN, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANTS.

DAN MOODY,
E. F. SMITH,
Attorneys for Appellants.

SMITH, BROWNLEE & GOLDSMITH,
Of Counsel.

SUBJECT INDEX.

Page No.

Opinion of the court below 1

Jurisdiction 2

Statement of the case 2

Specification of Errors 8

Summary of Argument 12

Point A. Summarized, this point is to the effect that it was an abuse of judicial discretion for the court to enjoin Appellants, as was done, because Appellees' petition and bill of complaint does not set forth facts sufficient to constitute a cause of action at law or in equity against those sought to be enjoined, and the bill of complaint is obviously devoid of equity upon its face, and because the act sought to be enjoined is a lawful act, and was not done maliciously to vex, annoy or injure another 12

Point B. The act of the Governor, in restricting the production of crude oil by Plaintiffs during the existence of insurrection and riot, and imminent danger thereof, in the East Texas oil field was a lawful act and necessary in order to suppress and prevent insurrection and riot 12

Argument 13

TABLE OF CASES.

	Page No.
Alabama vs. United States, 49 S. Ct. 266	14
Atlantic Coast Line Ry. Co. vs. Goldsboro, 232 U. S. 548	55
Castner vs. Coffman, 178 U. S. 183	20
Commonwealth vs. Shortall , 206 Pa. 165	23
Compaigne vs. Louisiana, 186 U. S. 380	53
Ely vs. Smith, 71 Mass. 121	23
Ex parte Jones, 77 S. W. 1029	23
Ex parte McDonald, 45 Mont. 454	23
Franks vs. Smith, 142 Ky. 232	25, 48
Hanover Star Milling Co. vs. Allen & Wheeler, 208 Fed. 513	14
In re Moyer, 35 Col., 159	26
Kryptok vs. Stead Linz Co., 190 Fed. 767	16
Keely vs. Sanders, 94 U. S. 441	53
Luther vs. Borden, 7 Howard 1	35
Marberry vs. Madison, 1 Cranch 165	51
Martin vs. Mott, 12 Wheaton 19	26, 39, 46
Mast Foos & Co. vs. Stover Mfg. Co., 177 U. S. 495	18
Mitchell vs. Harmony, 13 Howard 115	46
Minneapolis vs. Beckwell, 129 U. S. 25	53
Moyer vs. Peabody, 212 U. S. 78	23, 35, 43
New York vs. Town of Bristol, 151 U. S. 556	52
Public Clearing House vs. Coyne, 194 U. S. 496	54
Smith vs. Hill, 5 Fed. (2d) 188	21
State vs. Brown, 77 S. E. 243	25
Stewart vs. Kahn, 78 U. S. 176	42
Truly vs. Wanzer, 5 Howard 141	15
United States vs. Fischer, 280 Fed. 208	24, 44
United States vs. Wolters, 268 Fed 69	24, 37, 44

TEXAS CONSTITUTION AND STATUTES CITED.

	Page No.
Constitution of Texas, Article 4, Section 1	27
Constitution of Texas, Article 4, Section 10	27
Constitution of Texas, Article 4, Section 7	27
Article 5889, R. C. S. of Texas, 1925	27-30
Article 5834, R. C. S. of Texas, 1925	28
Article 5830, R. C. S. of Texas, 1925	29
Article 5778, R. C. S. of Texas, 1925	30

TEXTBOOKS AND LAW REVIEWS CITED.

Corpus Juris, Vol. 54, pages 841-842	23
Hair on American Constitutional Law, lec. 42, page 924	23
Illinois Law Review, vol. 23, page 766	23
Watson on The Constitution, volume 1, page 693	50

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 746

R. S. STERLING, Governor of Texas, ET AL.,
Appellants,

vs.

E. CONSTANTIN, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANTS.

I.

Official Report of the Opinion Below.

The opinion of the District Court for the Eastern District of Texas in this case is reported in Constantin, et al., vs. Smith, et al., 57 Fed. (2d) 227. The opinion also appears on pages 103 et seq. of the Printed Record.

II.

Jurisdiction.

There has heretofore been filed in this court a printed statement of basis on which Appellants contend this court has jurisdiction to review on appeal the decree appealed from in this case.

III.

Statement of the Case.

The Appellant, Hon. R. S. Sterling, Governor of the State of Texas, on August 16, 1931, declared by formal proclamation a state of insurrection, tumult, riot and breach of the peace, and imminent danger of insurrection, tumult, riot and breach of peace, to exist in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas. (R. 90).

In the above mentioned proclamation, the Governor of Texas directed the Appellant, Hon. Jacob F. Wolters, Brigadier General Texas National Guard, to assume supreme command of the situation in the territory affected and without delay shut down each and every producing crude oil well and/or producing well of natural gas, and to further take such steps as he might deem necessary to enforce and uphold the majesty of the law, subject to the orders of the Governor. (R. 90).

Subsequently, and after the Railroad Commission of Texas, which body is authorized by law to enforce the conservation laws of the State of Texas in regard to the production of oil, had on September 2, 1931, made and caused to be entered an order fixing the amount of oil that could be produced from any producing oil well in the Counties of Gregg, Upshur, Rusk and Smith, the Governor then permitted the oil wells to reopen and to produce oil at the rate of 225 barrels per day per well, as authorized by the order of the Railroad Commission of Texas. (R. 78).

On September 18, 1931, the Railroad Commission issued and promulgated a supplemental order reducing the allowable production of oil per well, in the East Texas district, from 225 barrels per day to 185 barrels of oil per day. (R. 97).

On October 10, 1931, the Railroad Commission of Texas issued a second supplemental order reducing the daily well allowable of crude oil from 185 barrels to 165 barrels per well. (R. 98).

Each and all of the several orders issued by the Railroad Commission of Texas, fixing the daily well allowable of crude oil in the East Texas district, expired by its terms on October 31, 1931. (R. 99).

The Governor permitted oil to be produced from the oil wells located in the Counties of Gregg, Upshur, Rusk and Smith, which counties are in East Texas and constitute what is known as the East Texas Oil Field, in the amounts named in the sev-

eral orders of the Railroad Commission of Texas fixing the daily well allowable of crude oil produced. (R. 78).

After October 31, 1931, there was no order of the Railroad Commission of Texas fixing the daily allowable of crude oil produced in the East Texas Oil Field. On October 29, 1931, the Governor, by executive order, directed General Wolters to limit production to 150 barrels of oil per day per well. In this proclamation, the Governor stated:

"I believe that it is necessary, as a precaution against acts of insurrection, riot, breach of peace, tumult and general disorder, of which there is imminent danger in the aforesaid counties, and that it is a proper measure and the only means at my command to suppress the existing insurrection in said counties and prevent further acts of insurrection, riot, tumult, breach of peace and general disorder in said counties, and to remove the existing imminent danger of such unlawful acts in said counties, for me to cause oil production from each well in said counties to be limited and restricted for the present to 150 barrels of oil per day." (R. 93-94.)

On November 6, 1931, the Governor issued another executive order to General Wolters, and for the same reasons as those given in executive order of date October 29, 1931, the Governor directed General Wolters to restrict and limit the production of oil in the above named counties to 125 barrels of crude

petroleum to be produced per day from each well. (R. 95).

On December 10, 1931, by executive order, the Governor directed General Wolters, and for the same reasons given in executive order of date October 29, 1931, to restrict and limit the production of oil to 100 barrels of crude petroleum to be produced per day from each well. (R. 96).

The original bill of complaint averred that the statutes of the State of Texas, by authority of which the Railroad Commission of the State of Texas acted in making the orders fixing the amount of oil and gas that an operator of an oil and gas well could produce, were invalid because in violation of the Constitution of the United States, and that the orders so made by the Railroad Commission were likewise in violation of the Constitution of the United States.

Afterwards, by amended pleadings, the Governor of the State of Texas, Hon. R. S. Sterling, and the Adjutant General of the State of Texas, Hon. W. W. Sterling, were made parties to this suit. Hon. Jacob F. Wolters, Brigadier General Texas Nation Guard, was an original party defendant to the suit.

By amended pleadings it was averred, in addition to averments contained in the original petition, that the Defendant R. S. Sterling, Governor of Texas, had declared Martial Law in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, and, with the aid and assistance of Defendants W. W.

Sterling, Adjutant General of the State of Texas, and Jacob F. Wolters, Commanding Officer of the military forces in the above named counties, were taking the property of complainants without due process of law and in violation of the 14th Amendment to the Constitution of the United States, in this, that by force of arms complainants were compelled to restrict production of oil from their wells to 100 barrels of oil per day, when each of Appellees' wells was capable of producing, without physical waste, 500 barrels per day.

By amended pleadings, it was further averred by complainants that the statutes of the State of Texas, authorizing the Governor to use military force to suppress insurrection, riot and breach of the peace, were unconstitutional in this, that said statutes were in violation of the Constitution of the United States. (R. 1-19-48-49).

The answer of the Railroad Commission of Texas, which was made a defendant by complainants' original bill and continued as a defendant by complainants' amended pleadings, was to the effect, among other things, that the orders of the Railroad Commission, which were sought to be enjoined, had by their own terms expired on October 31, 1931, and that said Railroad Commission at the time complainants' application for temporary injunction was heard were not attempting or threatening to enforce any of its orders limiting the per well production of

oil in the East Texas district, or limiting the oil-gas ratio complained of in complainants' bill. (R. 99).

No interlocutory injunction was issued as against the Railroad Commission. The temporary injunction granted was against the Appellants, R. S. Sterling, Governor of Texas, W. W. Sterling, Adjutant General of Texas, and Jacob F. Wolters, Brigadier General Texas National Guard.

This suit, insofar as these Appellants are concerned, was brought for the purpose of enjoining them, and each of them, from enforcing the orders of the Governor fixing the amount of oil that could be produced from each of the four wells owned by Appellees, which wells are situated in the counties above named. (R. 19).

The application of Apellees for a temporary restraining order was heard in Houston, Texas, on January 4, 1932, before a three-judge court organized as provided by Section 266 of the Judicial Code (28 USCA, Sec. 380); and, thereafter on the 26th day of February, 1932, said court granted the temporary injunction as prayed for, the decree of the court being to the effect that Hon. R. S. Sterling, Governor of Texas; Hon. W. W. Sterling, Adjutant General of Texas; and Hon. Jacob F. Wolters, Brigadier General Texas National Guard, "and all persons acting for or with or under the direction of them, be and they are hereby enjoined from enforcing against complainants any of their so-called mili-

tary or executive orders, passed or to be passed, regulating or restricting the production of oil from the complainants' wells, or from in any manner, directly or indirectly, interfering with the lawful production of oil from complainants' property. This injunction to remain in force subject to further orders of this court until the final adjudication of this cause . . . ." (R. 103).

IV.

Specification of Errors.

1. The court erred in granting the injunction as against these Appellants, and as against each of them, because the judgment, order or decree of the court, granting such interlocutory injunction, is without support, either in the facts or by the law of this case. (Appellants' 10th Assignment of Error. R. 395).

2. The court erred in finding that it had jurisdiction to hear, determine and grant the injunction against these Defendants, the Governor of Texas, the Commanding Officer of the military forces of the State of Texas, and the Adjutant General of the State of Texas. (Appellants' 1st Assignment of Error. R. 393).

3. The court erred in finding that it had jurisdiction to inquire into and determine whether, as a matter of fact, an insurrection or riot, or imminent

danger thereof, existed in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, at a time when the Governor of Texas, in the exercise of his discretion and judgment, had determined that an insurrection and riot, or imminent danger thereof, did exist, and had by proclamation declared Martial Law, which was in force and effect at the time of the hearing and decision of this case, and which was declared for the purpose of suppressing and preventing insurrection and riot in said Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas. (Appellants' 2nd Assignment of Error. R. 393-394).

4. The court erred in finding that the evidence showed no insurrection or riot existed in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, on August 16, 1931, or on October 13, 1931, or at the time this cause was heard and decided by this court. (Appellants' 3rd Assignment of Error. R. 394).

5. The court erred in finding that there was no warrant in the evidence for the belief, on the part of the Defendants and Appellants, R. S. Sterling and Jacob F. Wolters, that there was imminent danger of insurrection or riot in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, on August 16, 1931, or on October 13, 1931, or at the time this case was heard and decided by this court. (Appellants' 4th Assignment of Error. R. 394).

6. The court erred in finding that the Defendant and Appellant, R. S. Sterling, as Governor of Texas, had ousted the Railroad Commission of the State of Texas from the exercise of its jurisdiction in the matter of enforcing the conservation laws of the State of Texas, as applied to the production of crude petroleum. (Appellants' 5th Assignment of Error. R. 394).

7. The court erred in finding that the Defendant and Appellant, R. S. Sterling, as Governor of the State of Texas, had no authority under the Constitution and laws of the State of Texas to declare Martial Law. (Appellants' 6th Assignment of Error. R. 394).

8. The court erred in finding that the restriction placed by the Governor upon the production of crude petroleum by the Plaintiffs, during the existence of Martial Law under the Constitution and statutes of Texas, as a means of preventing and suppressing insurrection and riot, or imminent danger thereof, was a taking of the plaintiffs' property or a tresspass upon the property rights of the Plaintiffs, in violation of the 14th Amendment to the Constitution of the United States. (Appellants' 7th Assignment of Error. R. 394-395).

9. The court erred in finding that this suit, insofar as it is against these Defendants and Appellants in their official capacities, as Governor of the State of Texas, as Adjutant General of the State of

Texas, and as Commanding Officer of the military forces during martial law, was not a suit against the State of Texas. (Appellants' 8th Assignment of Error. R. 395).

10. The court erred in granting the injunction against these Defendants and Appellants, enjoining them, and each of them, in their official capacity, from interfering with the production of oil by plaintiffs from land situated in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, at a time when, according to the judgment and discretion exercised by the Defendant and Appellant R. S. Sterling as Governor of the State of Texas, there was insurrection, riot and tumult, and imminent danger thereof, in said counties, and at a time when by proclamation of the Governor martial law was being maintained and enforced in said counties. (Appellants' 9th Assignment of Error. R. 395).

11. The court erred in holding that it had jurisdiction to review, inquire into, and control by injunction the means employed by the Defendant and Appellant, R. S. Sterling as Governor of Texas, under martial law, to suppress the insurrection and riot, and imminent danger thereof, found and declared by him to exist in his proclamation declaring Martial Law, in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, and in substituting its judgment and discretion for that of the

Governor of Texas in determining the means to be employed under Martial Law to suppress the riot and insurrection, and imminent danger thereof, found to exist in the proclamation declaring Martial Law. (Appellants' 11th Assignment of Error. R. 395-396).

V.

Summary of Argument.

Point A. There is an abuse of judicial discretion by the court, in granting the interlocutory injunction, because:

1. Appellees' petition and bill of complaint does not set forth facts sufficient to constitute cause of action at law, or in equity, against Appellants.

2. The bill of complaint is obviously devoid of equity upon its face.

3. The act sought to be enjoined is a lawful act, and was not done maliciously to vex, annoy and injure Appellees.

Point B. The act of the Governor in restricting production of crude oil by plaintiffs during the existence of insurrection and riot and imminent danger thereof in the East Texas Oil Field was a lawful act and necessary in order to suppress and prevent insurrection and riot.

VI.

Argument.

Point A. Summarized, this point is to the effect that it was an abuse of judicial discretion for the court to enjoin Appellants, as was done, because Appellees' petition and bill of complaint does not set forth facts sufficient to constitute a cause of action at law or in equity against those sought to be enjoined, and the bill of complaint is obviously devoid of equity upon its face, and because the act sought to be enjoined is a lawful act, and was not done maliciously to vex, annoy and injure another.

Authorities.

Osborne vs. Bank, 9 Wheaton 866,
Truly vs. Wanzer, 5 Howard 141,
Mast F. & Co. vs. Stover Mfg. Co., 177 U. S. 495,
Castner vs. Kaufman, 178 U. S. 183,
Kryptok Co. vs. Stead Linz Co., 190 Fed. 767,
Hanover Star Milling Co. vs. Allen & Wheeler, 208 Fed. 513,
Smith vs. Hill, 5 Fed. (2d) 188.

It it established law in this court that the discretion exercised by a three-judge court, in granting or refusing to grant an application for an interlocutory injunction, will not be disturbed on appeal by this court, except for abuse of judicial discretion in

so granting or denying the application. Alabama vs. United States, 49 S. Ct. 266. It is believed that the granting of the interlocutory injunction in this case was an abuse of judicial discretion.

The definition of "judicial discretion" most often cited by the courts is that of Chief Justice Marshall in Osborne vs. Bank, supra, which definition is as follows:

"Judicial power, as contradistinguished from the power of the law, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discovered, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."

There is, of course, no better established rule of law than that the granting of a preliminary or temporary injunction is a matter resting largely in the discretion of the trial court. This discretion, however, is a legal discretion, and, as said by Chief Justice Marshall, "is exercised for the purpose of giving effect to the will of the law."

In Hanover Star Milling Co. vs. Allen & Wheeler Co., 208 Fed. 513, the court says:

"Though an order granting or denying a preliminary injunction will not be disturbed except for an abuse of discretion, a proper discretion does not include the misapplication of the law to conceded facts." Citing Winchester Repeating Arms Co. vs. Homestead, 203 Fed. 493.

In Truly vs. Wanzer, supra, this court quotes with approval the following language:

"There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity, that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate and commensurate remedy in damages. The right must be clear, the injury impending and threatened, so as to be averted only by the protection of preventive process of injunction."

The statement cannot be over-emphasized that before injunction issues "the right must be clear" on the part of the plaintiff to an injunction.

It is believed that Appellees were not, under the law, entitled to a temporary injunction. Their right to injunctive relief not only is not clear, but, it is believed that the legal right to the relief they sought and obtained does not exist. If we are correct in this contention, it necessarily follows that the granting of a temporary injunction was an

abuse of judicial discretion. In granting or refusing a temporary injunction, the court must be guided by conclusions based upon the law and the facts disclosed by the particular case. We think it is clear that where a court grants a temporary injunction, where plaintiff is not entitled as a matter of law to the injunction, that there is and must necessarily be an abuse of judicial discretion in the granting of the injunction.

Circuit Judge Sandborne, in the case of Kryptok vs. Stead Linz Co., supra, lays down the generally accepted rule of law in regard to the matter under discussion. Judge Sandborne said:

"The granting of a preliminary injunction rests in the disretion of the trial court, not in its arbitrary, whimsical will, but in its sound judicial discretion, informed and guided by the established principles, rules and practices of equity jurisprudence; and where the court has not departed from them, its injunctional orders may not be reversed without clear proof of an abuse of its discretion."

The foregoing statement is sound authority for the proposition that where a court issues a temporary injunction contrary to "the established principles, rules and practices of equity jurisprudence," that its action must be reversed by the higher court. It becomes important to ascertain what are the established principles, rules and practices of equity

jurisprudence. Judge Sandborne, in the Kryptok case, states what these established principles of equity jurisprudence are. He says:

"One may not be enjoined from doing lawful acts to protect or enforce his rights of property or of persons, unless his acts to that effect are clearly shown to be done unnecessarily, and not for the purposes of preserving and enforcing his rights, but maliciously to vex, annoy and injure another."

It appears clearly from the foregoing statement of established principles of equity jurisprudence that the three-judge court, in granting the temporary injunction against the Governor, the Adjutant General and General Wolters, did abuse its judicial discretion, provided the acts of the Governor, the Adjutant General and General Wolters which were enjoined were lawful acts and were not done maliciously to vex, annoy and injure Appellees.

The Appellants were acting for the purpose of protecting the State of Texas in its inherent right as a government to maintain law and order, and to prevent and suppress insurrection and riot and imminent danger thereof. If the acts enjoined were lawful, then the judgment of the three-judge court, in enjoining the Appellants from the performance of these lawful acts, was an abuse of judicial discretion.

It is believed that Appellees' bill of complaint

shows on its face that the acts of Appellants, which were sought to be enjoined, were lawful acts, and therefore the bill was devoid of equity.

As we understand the decision of this court in Mast F. Co. vs. Stover Mfg. Co., supra, it is established law in this court that an interlocutory injunction granted upon a bill of complaint devoid of equity discloses such an abuse of judicial discretion as to warrant this court in reversing the judgment of the lower court. In the Mast case, immediately upon filing the bill of complaint motion was made for a preliminary injunction and the motion was granted. From this action of the trial court an appeal was taken to the Circuit Court of Appeals. The Circuit Court of Appeals not only reversed the order for the injunction, but dismissed the bill. From this action of the Circuit Court, Mast Foos & Co. applied for and was granted a writ of certiorari from this court. The judgment of the Circuit Court of Appeals was by this court affirmed, and, in the course of its opinion this court said:

"One of the principal questions pressed upon our attention related to the power of the Court of Appeals to order the dismissal of the bill before answer filed, or proofs taken, upon appeal from an order granting a temporary injunction.

"This question is not necessarily concluded by Smith v. Vulcan Iron Works, 165 U. S. 518, since in that case the interlocutory injunction was granted after answer and replication filed, a full hearing had

upon pleadings and proofs, and an interlocutory decree entered adjudging the validity of the patent, the infringement and injunction, and a reference of the case to a master to take an account of profits and damages. In that case we held that, if the appellate court were of opinion that the plaintiff was not entitled to an injunction because his bill was devoid of equity, such court might, to save the parties from further litigation, proceed to consider and decide the case upon its merits, and direct a final decree dismissing the bill.

"Does this doctrine apply to a case where a temporary injunction is granted pendente lite upon affidavits and immediately upon the filing of a bill? We are of opinion that this must be determined from the circumstances of the particular case. If the showing made by the plaintiff be incomplete; if the order for the injunction be reversed, because injunction was not the proper remedy or because under the particular circumstances of the case, it should not have been granted; or if other relief be possible, notwithstanding the injunction be refused, then, clearly, the case should be remanded for a full hearing upon pleadings and proofs. But if the bill be obviously devoid of equity upon its face, and such invalidity be incapable of remedy by amendment; or if the patent manifestly fail to disclose a patentable novelity in the invention, we know of no reason why, to save protracted litigation, the court may not order the bill to be dismissed. . . . Or, if not question be made regarding the identity of the alleged infringing device, and it appear clear that such device is not an infringement, and no suggestion be made of further proofs upon the subject, we think the

court should not only overrule the order for the injunction, but dismiss the bill. Gardt v. Brown, 113 Illinois, 475. This practice was approved by the Chief Justice in a case where the bill disclosed no ground of equitable cognizance, in Greene v. Mills, 25 U. S. App. 383, and by the Circuit Court of Appeals for the Sixth Circuit in Knoxville v. Africa, 47 U. S. App. 74, where the question involved was one of law and was fully presented to the court. The power was properly exercised in this case."

In Castner vs. Coffman, supra, application was made for an injunction to enjoin the use of the name "Pocahontas" or "Pocahontas Flat Top" by defendants in connection with their coal mining operations. Affidavits and exhibits were filed with the bill in support of the motion for injunction, and demurrers to the bill having been overruled the defendant filed an answer accompanied by affidavits and exhibits in opposition to the motion for an injunction. Several affidavits in rebuttal were thereupon filed on behalf of complainants. Upon the record thus made the motion for injunction was heard, and after consideration by the court an injunction was granted. The defendant appealed to the Circuit Court of Appeals for the 4th Circuit. The Circuit Court of Appeals reversed the decree of the trial court and remanded the cause with directions to dismiss the bill. The cause was then brought to this court by writ of certiorari.

The judgment of the Circuit Court, refusing and

directing dismissal of the bill of complaint, was by this court affirmed. In the course of its opinion this court (exact page 184) said:

"As respects the case at bar, we are satisfied from the averments of the bill and the proof that no supplementary evidence could be offered which would alter the indubitable conclusion that no exclusive right to the trademark or trade name Pocahontas exists in the complainants. Further, we concur in the conclusion of the Circuit Court of Appeals, that the bill, upon its face, is devoid of equity."

In Smith vs. Hill, supra, decided by the Circuit Court of Appeals for the 3rd Circuit, opinion by Circuit Judge Woolley, an appeal was taken from the action of the District Court in refusing to approve or confirm a bid made at a receivers sale, and charging that the trial court in refusing confirmation abused his discretion, in that he acted on an absence of evidence that the bid was grossly inadequate. In passing on this point the court used the following language:

"If this be true, he erred, for judicial discretion is not an indulgence of a judicial whim, but is the exercise of judicial judgment based on the facts and guided by law."

The Circuit Court then reviewed all of the facts in the case and determined that the facts did sup-

port the action of the trial court in refusing to approve or confirm the bid made by Appellant at the receivers sale.

The point in the case is that where abuse of judicial discretion is alleged, whether in the granting of a temporary injunction, or in some other matter, it is the duty of the appellate court to ascertain whether the action of the trial court, in its alleged exercise of judicial discretion, was "guided by law," and whether its action was supported by the evidence.

It is believed that this court must necessarily inquire into and determine, first, whether the acts of Appellants, which were enjoined by the three-judge court, were lawful acts and not done maliciously to vex, annoy and injure Appellees; second, whether the bill of complaint be obviously devoid of equity upon its face; and third, whether Appellees' bill of complaint sets forth facts sufficient to constitute a cause of action at law or in equity against the Appellants whose acts were sought to be enjoined.

Point B. Summarized, Point B is to the effect that the acts of Appellants which were enjoined are lawful acts.

Authorities.

Constitution of Texas, Art. 4, Sections 1, 7 and 10,
Articles 5889, 5834, 5830, 5778, Revised Civil Statutes of Tex., 1925,

Moyer vs. Peabody, 212 U. S. 78,
Mitchell vs. Harmony, 13 Howard, 115,
Martin vs. Mott, 12 Wheaton, 19,
Stewart vs. Kahn, 78 U. S. 176,
Marbury vs. Madison, 1 Cranch, 165,
Luther vs. Borden, 7 Howard, 1,
Compaigne vs. Louisiana, 186 U. S. 380,
New York vs. Town of Bristol, 151 U. S. 556,
Keely vs. Sanders, 99 U. S. 441,
Minneapolis vs. Beckwell, 129 U. S. 25,
Public Clearing House vs. Coyne, 194 U. S. 496,
Atlantic Coast Line Ry. Co. vs. Goldsboro, 232 U. S. 548,
United States vs. Wolters, 268 Fed. 69,
United States vs. Fischer, 280 Fed. 208,
In re Moyer, 35 Colorado, 159,
Commonwealth vs. Shortall, 206 Pa. 165,
State vs. Brown, 77 S. E. 243,
Ex parte Jones, 77 S. W. 1029,
Franks vs. Smith, 142 Ky. 232,
Ex parte McDonald, 45 Montana 454,
In re Boyles, 6 Idaho, 609,
Ely vs. Smith, 71 Mass. 121,
54 Corpus Juris, 841, 842,
Hair on American Constitutional Law, Lec. 42, page 924,
Illinois Law Review, Vol. 23, page 766.

The Governors' declaration that a state of insurrection and riot, and imminent danger thereof, existed is conclusive evidence of that fact.

This court, in Moyer vs. Peabody, supra, said:

"It is admitted, as it must be, that the Governor's declaration that a state of insurrection existed is conclusive of that fact."

In the case of United States vs. Wolters, supra, Judge Rufus Foster, now United States Circuit Judge for the 5th Circuit, used the following language:

"There is no doubt that by the Constitution and laws of Texas the Governor is charged with the duty of enforcing the laws of the State, and has authority to call out the militia to enforce the laws in case of riot or breach of peace, or imminent danger thereof. The question as to whether there is riot, or insurrection, or breach of peace, or danger thereof, is one solely for the Governor. The courts will not interfere with his discretion in that and will not inquire as to whether or not the facts justify the Governor."

In United States vs. Fischer, supra, the court said:

"The Governor may make the ordinary use of soldiers to suppress an insurrection, and his declaration of the existence of a state of insurrection is conclusive."

In the case of in re Boyles, supra, the Supreme Court of Idaho said:

"On application for writ of habeas corpus, the truth of the evidence of the alleged facts in a

proclamation issued by the Governor proclaiming a certain county to be in a state of insurrection will not be inquired into or reviewed."

In State vs. Brown, supra, the Supreme Court of West Virginia, in discussing this question, used the following language:

"It seems to be conceded that if the Governor has the power to declare a state of insurrection, his action in doing so is not reviewable by the courts. Of the correctness of this view we have no doubt. The function belongs to the executive and legislative departments of the Government, and is beyond the jurisdiction and power of the courts."

In Franks vs. Smith, supra, the Supreme Court of Kentucky used the following language:

"It will be observed that there is no limitation, either in the Constitution or statutes, upon the power vested in the Governor to order into active service the militia of the State, or to direct into what locality they shall go or operate. He is made the sole judge of the necessity that may seem to demand the aid and assistance of the military forces of the state in suppressing disorder and restoring obedience to the law. . . . But to his good judgment and sound discretion the law has left the final decision as to whether the military arm of the state shall be ordered into active service. If he acts wisely and prudently, well and good. If he acts hastily and unwisely or imprudently, there is no power in the courts to

control or restrain his acts. Any attempt on the part of the judicial department of the state so to do would be an interference by one department of the government with the power lodged in another department."

In the case of in re Moyer, supra, the Supreme Court of Colorado said:

"By Section 5, Article 4, of our Constitution, the Governor is the commander-in-chief of the military forces of the State, except when they are called into active service of the United States, and he is thereby empowered to call out the military to suppress insurrection. It must, therefore, become his duty to determine what facts and conditions exist in a given locality which demand that in the discharge of his duties, as chief executive of the State, he shall employ the military to suppress. This being true, the recital in the proclamation to the effect that a state of insurrection existed in the County of San Miguel cannot be controverted. Otherwise, the legality of the orders of the executive would not depend upon his judgment but the judgment of another co-ordinate branch of the state government."

This court, in the case of Martin vs. Mott. 12 Wheaton 19, in a great and an elaborate opinion by Mr. Justice Storey, among other things, said:

"Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of con-

struction that the statute considers him the sole and exclusive judge of the existence of these facts."

We now respectfully direct the attention of the court to the controlling provisions of the Constitution and statutes of Texas.

Article 4, Section 1, of the Constitution declares:

"The executive department of the State shall consist of a Governor, who shall be the chief executive officer of the State . . ."

Section 10, Article 4, of the Constitution of Texas provides that the Governor:

"shall cause the laws to be faithfully executed. . ."

In order to obey the mandate of the people as contained in the Constitution, Section 7, Article 4, provides that the Governor:

"shall have power to call forth the militia to execute the laws of the State, to suppress insurrection. . . " etc.

The Legislature of Texas has provided, in Article 5889 Revised Civil Statutes of 1925, that:

"Whenever any portion of the military forces of this State is employed in aid of civil authority, the Governor, if in his judgment the maintenance of

law and order will thereby be promoted, may, by proclamation, declare the county or city in which the troops are serving, or any specific portion thereof, to be in a state of insurrection."

The term used in the foregoing statute, "employed in aid of civil authority," is not limited, of course, to aiding and assisting the sheriff, chief of police or constables of the city or town, but must necessarily mean, and does mean, in aid of civil government in all its scope, influence, authority and power.

Article 5834 declares:

"The Governor may order the active militia, or any part thereof, to assist the civil authorities in guarding prisoners, or in conveying prisoners from and to any point in this State, or discharging other duties in connection with the execution of the law as the public interest or safety at any time may require."

The power given the Governor, by the provisions of the foregoing statute, to order the active militia to assist civil authorities in the execution of the law as the public interest or safety at any time may require, is as broad and comprehensive as are the needs of the State, and involves necessarily every interest in which the public is concerned.

The public interest of Texas can hardly be more vitally concerned or affected in any one thing than it is in the oil industry. The State of Texas is a

great producer of crude petroleum and natural gas. This industry vitally affects a very large portion of the citizens of Texas in their private interests. The State, as a government, is vitally interested and affected by the oil industry because it derives a very large portion of its revenues from taxation, in various forms, of the oil industry. The State, as a land owner, is vitally interested and affected by the oil industries, because the State of Texas owns large areas of land, or the mineral interest therein, which produce crude petroleum. The public schools and the University of Texas are vitally interested and affected by the oil industry, because the State of Texas as Trustee holds for and on their behalf the legal title to large areas of land, or the mineral interest therein, which produce crude petroleum and natural gas.

Article 5830 of the Texas Statutes declares that the Governor may:

"when an invasion of, or an insurrection in, this State is made or threatened, or when the Governor may deem it necessary for the enforcement of the laws of this State, he shall call forth the active militia or any part thereof, to repel, suppress, or enforce the same, and if the number available is insuffcient, he shall order out such part of the reserve militia as he may deem necessary. . ."

It would be difficult indeed to use language broad-

er or more comprehensive than that used in the foregoing statute.

Article 5778 of the Texas Statutes declares:

"The Governor shall have the power in case of insurrection, invasion, tumult, riot or breach of peace, or imminent danger thereof, to order into active service of this State any part of the militia that he may deem proper. . ."

We find from the foregoing that the Governor of Texas is, by the Constitution itself, made the chief executive officer of the State and commander-in-chief of the military forces of the State, and that in mandatory language he is commanded by the Constitution to cause the laws to be faithfully executed, and in order to do this, he is given the power and authority by the Constitution itself to call forth the militia for several purposes: first, "to execute the laws of the State"; second, "to suppress insurrection"; and third, "to repel invasions and protect the frontier from hostile intrusions by Indians or other predatory bands."

We further find that the Legislature, itself, has in effect defined what constitutes an insurrection. As stated above, Article 5889 declares that the Governor:

"if in his judgment the maintenance of law and order will thereby be promoted, may, by proclamation, declare the county or city in which the troops

are serving, or any special portion thereof, to be in a state of insurrection."

Appellees, who are citizens of the State of Texas, predicated their action in the Federal Court, as against Appellants, upon the proposition that the foregoing provisions of the Constitution of Texas are:

"without effect lawfully to vest such power, authority, or discretion, or to justify such use thereof, and is unconstitutional and void for that same has the effect of and so operates as to deprive plaintiffs and each of them of their liberty, property and rights incident and appertaining thereto, in violationtion of that clause of the 14th Amendment of the Constitution of the United States wherein and whereby a state is inhibited from depriving any person of life, liberty, and property without due process of law, and wherein and whereby a state is inhibited from denying to any person within its jurisdiction the equal protection of the law." (R. 50.)

And, Appellees' action is further predicated upon the further contention:

"And if, as and to the extent that any statute of the State of Texas (particularly Articles 5830, 5831, and/or 5833, Revised Civil Statutes of Texas, 1925) vest or purport to vest in Defendant R. S. Sterling, Governor of Texas, or in any of the other Defendants, any such power, authority or discretion, same

does not lawfully so vest any such power, authority, or discretion, but is unconstitutional, void and without effect to vest or justify the use of any such power authority, or discretion and/or to warrant or justify any act or conduct of the Defendants complained of by plaintiffs because same was and is in violation of Section 24, of Article 1, of the Constitution of Texas. . . of Section 28 of Article 1 of the Constitution of Texas. . . of Section 1, Article 3, and of Section 1 of Article 2 of the Constitution of Texas. . . of Sections 13, 17 and 19, of Article 1 of the Constitution of Texas. . . of that provision of the 14th Amendment of the Constitution of the United States wherein and whereby it is provided 'Nor shall any state deprive any person of life, liberty or property without due process of law'. . . of that provision of the 14th Amendment of the Constitution of the United States wherein and whereby it is provided that no state shall 'deny to any person within its jurisdiction the equal protection of the law'. . . of that provision of Paragraph 1 of Section 10 of Article 1 of the Constitution of the United States wherein and whereby it is provided that 'no State shall . . . pass any . . . laws impairing the obligation of contracts' . . . and of that term of Section 16 of Article 1 of the Constitution of the State of Texas wherein and whereby it is provided that 'no . . . law impairing the obligation of contracts shall be made.' Of those terms of Paragraph 2 of Article 6, and of Sections 1 and 2 and Article 3, of the Constitution of the United States wherein and whereby, respectively, it is provided that the Constitution and laws of the United States made in pursuance of such constitution 'shall be the supreme

law of the land' and that the 'judicial power of the United States shall be vested in one supreme court and in such inferior courts as the Congress may, from time to time, ordain and establish' and that 'the judicial power shall extend to all cases in law and equity arising under' the constitution and laws of the United States and of the statutes of the United States. . ." (R. 50, 51, 42..)

It was Appellees' contention, as we understand their contention:

1. The production of oil is a legal business.
2. That it is lawful for them to produce all the oil their wells are capable of producing so long as there is no physical waste.
3. That no insurrection exists in the Counties of Gregg, Upshur, Rusk and Smith, and that there was and is no necessity for Martial Law therein.
4. That no local officer requested the Governor to send military aid.
5. That the action of the Governor in declaring Martial Law was a mere subterfuge, his real purpose being an economic one, namely, to increase the price of oil.
6. That it is unlawful for the Appellants, during Martial rule, to interfere with the Appellees' lawful conduct of a legal business.

Summarized, the contention of Appellees is that Appellants, in restricting them in the production of crude petroleum, were taking their property without due process of law.

The question presented by the pleadings of the parties is one of law. If the act of Appellants, in restricting production of crude petroleum by Appellees, amounted to a taking of their property without due process of law, then and in that event, the act of Appellants was an unlawful act. If, under the existing emergency created by the insurrection and imminent danger thereof, Appellants could legally restrict the production of crude petroleum by Appellees in order to suppress insurrection or prevent insurrectionary acts, riot, tumult and general disorder, then and in that event the act of Appellants was a lawful act, and it was an abuse of judicial discretion for the lower court to enjoin Appellants.

It is believed that this question has been determined by this court in the case of Moyer vs. Peabody, supra. In that case Mr. Moyer, the Appellant, had a right, a constitutional right, to his liberty, just as Appellees contend they have a right, a constitutional right to produce unlimited quantities of oil. The Governor of Colorado, right or wrong, determined that Mr. Moyer, so long as he was unrestrained of his liberty constituted a menace to the public welfare during the existence of martial rule. This court declared that Mr. Moyer must yield his individual right, his constitutional right, to liberty under the supreme police power of the state.

Moyer contended that he was deprived of his liberty without due process of law, just as Appellees

here contend that they are deprived of their property without due process of law. This court answered this contention of Mr. Moyer in one sentence, and the answer is believed to constitute a complete answer to Appellees' contention, upon which contention they must stand or fall. This court said:

"Public danger warrants the substitution of executive process for judicial process."

This court, in Luther vs. Borden, supra, had before it an action in trespass brought by Luther against Borden and others. The action was grounded on the fact that the defendants had, acting without a warrant, broken into and entered plaintiff's home and endeavored to arrest him. The defendants justified their acts by asserting that a state of insurrection existed, and that martial rule had been declared. Mr. Chief Justice Taney wrote the opinion of the court. He said:

"The remaining question is, whether the defendants, acting under military orders issued under the authority of Government, were justified in breaking and entering the plaintiff's house. In relation to the act of the Legislature declaring Martial Law, it is not necessary in the case before us to inquire to what extent, nor under what circumstances, that power may be exercised by a State. Unquestionably, a military government, established as a permanent government of the State, would not be a re-

publican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the State authorities. And, unquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union, as to any other government. The State itself must determine what degree of force the crisis demands. And if the Government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State as to require the use of its military force and the declaration of Martial Law, we see no ground upon which this court can question its authority. It was a state of war, and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things, the officers engaged in its military service might lawfully arrest any one, who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, Martial Law and the military array of the Government would be a mere parade, and rather encourage attack than repel it. No

more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purpose of opression, or any injury wilfully done to person or property, the party by whom, or by whose order, it is committed, would undoubtedly be answerable."

During Martial Law at Galveston in 1920, Honorable W. P. Hobby, Governor of Texas, suspended from office certain city officials, including the mayor and four city councilmen, the city attorney, the judge of the city court, chief of police, and the chief of detectives. There is no provision in the Constitution or statutes of the State of Texas which expressly authorized the Governor to suspend local officials from office. Governor Hobby acted under the authority of military necessity. A public office is, of course, property. Judge Foster, in United States vs. Wolters, supra, sustained the action of Governor Hobby. Judge Foster said:

"If the civil officers at Galveston were not performing their duties, and not aiding in the enforcement of the law, the Governor would be authorized to suspend them. He did that, and in my opinion the suspension was legal."

In this case, the Appellant, Hon. R. S. Sterling Governor of Texas, believed that the running of Appellees' wells wide open would interfere with his efforts to suppress the existing insurrection, and to

prevent further acts of insurrection, riot, tumult and disorder, limited the production of oil from said wells during the emergency. Appellees were temporarily deprived of the use of their proprty, just as the officials at Galveston were temporarily deprived of the use of their property, and just as Mr. Moyer was temporarily deprived of his liberty. It all comes under the supreme power of the State. There are times when private rights, either of liberty or of property, must yield to public need.

In the opinion of the lower court, it is held that the Governor of Texas has no authority, under the Constitution of the State, to declare Martial Law. In doing this, the lower court expressly overruled the opinion of Judge Rufus Foster in United States vs. Wolters, supra, where Judge Foster had expressly held that the Governor of Texas did have the authority, under the Constitution of the State, to declare Martial Law. In our view of the case, it is immaterial whether the Governor does or does not have the authority to declare Martial Law. The lower court held that the Governor had the right to use state troops to suppress and prevent insurrection, riot, tumult and disorder.

We do not want to be understood as agreeing with the view of the lower court that the Governor of Texas does not have the power under the Constitution of Texas to declare Martial Law. We are emphatically of the opinion that the Constitution

of Texas does vest in the Governor the power to declare Martial Law. The point we desire to make, however, is that whether he has or has not the power to declare Martial Law, he does have the power to use State troops to suppress and prevent insurrection, riot, tumult and disorder. Having this power, —and the lower court holds that he did have this power—the Governor must necessarily determine when the troops shall be used and what steps are necessary to be taken in order to suppress and prevent insurrection, riot, tumult and disorder. The determination of this question by the Governor is necessarily exclusive. There is no court that can substitute its judgment and discretion for that of the Governor, first, as to the necessity of calling out the troops; and second, as to what steps shall be taken in order to make the use of the troops effective.

In Martin vs. Mott, supra, the power of the President to exercise his judgment and discretion was questioned, just as the power of the Governor of Texas to exercise his judgment and discretion is questioned in this case. This court, in an opinion by Mr. Justice Storey, held that neither this court nor any other authority or individual could inquire into the exercise of discretion thus vested in the President. The court said:

"We are all of opinion that the authority to decide whether the exigency has arisen, belongs exclusively

to the President, and that his decision is conclusive upon all other persons."

This court further said:

"He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act and decides to call forth the militia his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow as a necessary consequence, that every act done by a subordinate officer in obedience to such orders, is equally justifiable."

This court, in Martin vs. Mott, used the following language, which we think is very much in point in this case:

"The law contemplates that under such circumstances, orders shall be given to carry the power into effect."

The Governor of Texas, not only has the power, but it is made his mandatory duty by the Constitution itself to cause the laws to be faithfully executed, and to do this, he is given power to call out the militia. Is this power to be exercised merely that the militia may go upon dress parade? To apply the law, as announced by this court in Martin vs. Mott, it is apparent that the Constitution and laws of Texas contemplate that under such circumstances,

orders shall be given to carry the power thus vested in the Governor into effect. Someone must determine what orders are necessary in order to make this power, thus vested in the Governor, effective. Necessarily, this power is lodged in the Governor. The Governor exercises his discretion and forms a judgment as to what is necessary to be done. No court can, by any possibility of the most vivid imagination, have any power or authority to substitute its judgment for the judgment of the chief executive officer of the State of Texas as to what orders shall be given to make use of the troops effective, the Governor having determined the necessity for using troops.

When that great and courageous President, Grover Cleveland, during the Pullman strike in Chicago, called out the military forces to execute the laws, keep the mails moving and maintain peace, could or would any court have attempted to substitute its judgment for that of the President as to what steps were necessary to suppress the insurrection and outlawry that existed during that strike?

It is believed that the authorities which we are now discussing establish the proposition that the lower court was utterly without jurisdiction to grant the relief prayed for as against Appellants. It may be that this court will not inquire into the question of jurisdiction on this appeal from an order granting an interlocutory injunction. It is believed that

it is proper for the court to do so, because if the court below had no jurisdiction, then it must of necessity follow that there was not only an abuse but a very great abuse of judicial discretion. If the court had no power to act, then its act, in enjoining Appellants, was necessarily an act not sanctioned by law. If the court had no authority to act, then it had no right to exercise any discretion, and any attempt to exercise discretion without authority must necessarily be an abuse of judicial power, which is all that the exercise of judicial discretion is.

The foregoing paragraph is said by way of parenthesis. The authorities which we are now discussing are cited and relied on by Appellants as sustaining their contention that the act enjoined was a lawful act, and that, therefore, the order of the court below in enjoining Appellants was an abuse of judicial discretion, and such an abuse as should be corrected by this court on this appeal from the order granting the interlocutory injunction.

This court, in Stewart vs. Kahn, supra, used the following language:

"The measures to be taken in carrying on war and to suppress insurrection, are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution.

"In the latter case the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to

guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."

In this case it is our earnest contention that the measures to be taken to suppress the insurrection, which the Governor has found to exist in East Texas, and to suppress the imminent danger of further insurrection which he has also found to exist, are not defined either by the Constitution of the Nation or of the State; and that, therefore, as said by this court, the decision as to what measures are to be taken "rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."

In Keely vs. Sanders, supra, this court used the following language:

"Further than this, whether the military authority had been established throughout Shelby County before the commissioners entered upon the discharge of their duties, is a political question, to be answered by the executive branch of the government and not by the courts."

In Moyer vs. Peabody, supra, this court referring to the Governor said:

"That means that he shall make the ordinary use of the soldiers to that end, that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such

arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power."

In United States vs. Fischer, supra, the court used the following language:

"The governor may make the ordinary use of soldiers to suppress insurrection and his declaration of the existence of a state of insurrection is conclusive. . .

"When a state of war or insurrection exists, and the Governor has legally called into action the military forces of the state, the will of the commander becomes the controlling authority in the occupied territory, so far as he chooses to exert it, subject to the laws and usages of war. . .

"In cases of military occupancy during war or insurrection, the passing of the military lines by persons without permission, the possession of arms and ammunition, the sale of intoxicating liquors, may cause the commander the loss of a battle, and yet these acts may not offend against the local laws. The usage in time of war has been to make regulations covering offenses in violation of the laws of war or of military discipline."

In United States vs. Wolters, supra, Judge Foster, after declaring that the Governor of Texas had the authority to issue a proclamation declaring Martial Law, used the following language:

"He could do anything necessary to make his proclamation effective."

The court below was apparently of the opinion that injunction was the only remedy whereby the Governor could be prevented from abusing the great power vested in him by the Constitution and statutes of Texas, in regard to the use of troops. There are many remedies to prevent an abuse of the executive power in the use of soldiers. The remedy is not, however, by injunction. We submit that in our investigation of this question, we have found no case where any court, Federal or State, has ever before enjoined the Governor of a State from using troops as he, in his judgment and discretion, determined was necessary and advisable in order to suppress insurrection and danger thereof.

When any Governor of Texas abuses, if such an occasion should ever arise, the power vested in him to use the troops to suppress insurrection and danger thereof, any citizen feeling himself injured by such abuse of power has his remedy in a civil action for damages after the military operations have ceased. If the Governor or any subordinate officer during military operations violates a criminal law of the State or of the Nation, he may be indicted by a Federal or State grand jury and tried for the offense alleged to have been committed. The frequency of elections assures the defeat for reelection of any Governor who abuses the great confidence the people have in the men who are to serve in that capacity. The watchfulness of the State's representatives is a constant safeguard against abuse of

this great, and at the same time necessary, power lodged in the chief executive officer of the State. Under the laws of Texas, the Legislature may convene itself for impeachment purposes. If a tyrant fills the office of chief executive officer of the State of Texas and by his acts and conduct deprives the State of a republican form of government, the power of the Nation may be exercised to carry out the guarantee of the National Constitution that each State shall have and enjoy a republican for mof government.

This court, in Martin vs. Mott, supra, made this statement:

"It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself. In a free government the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny."

In Mitchell vs. Harmony, supra, this court said:

"There are, without doubt, occasions in which private property may lawfully be taken possession of

or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.

In this same case, this court further said:

"It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.

"In deciding upon this necessity, however, the state of the facts, as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others as well as his own observation."

Mitchell vs. Harmony was a suit instituted to recover the value of certain property taken by Colonel Mitchell in the province of Chihuahua, during the war with Mexico.

It was a suit, after war had ceased, to recover the value of property taken or injured by the military during the course of the war. Here, as we have hereinabove asserted, is the remedy of Appellees, or anyone else feeling himself aggrrieved by the acts of the Governor or his military officers during the existence of insurrection or imminent danger thereof, which now exists in East Texas.

In the course of its opinion in Mitchell vs. Harmony, this court further said:

"And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous, will not make him a trespasser."

In the Franks case, supra, the Supreme Court of Kentucky, referring to the Governor, said:

"He is made the sole judge of the necessity that may seem to demand the aid and assistance of the military forces of the state in suppressing disorder and restoring obedience to the law. . . To his good judgment and sound discretion the law has left the final decision as to whether the military arm of the state shall be ordered into active service. If he acts wisely and prudently, well and good. If he acts hastily or unwisely or imprudently, there is no power in the courts to control or restrain his acts. Any attempt on the part of the judicial department of the state so to do would be an interference by one department of the government with the power lodged in another department. . ."

In the Franks case, the court made the further statement:

"The power thus lodged in the Governor is extensive, unrestrained, and subject to abuse. But all

power is subject to abuse. If the fact that power might be abused was sufficient to deny the granting of it, there could be no final authority, and everything must be referred back to the people,—the source of all power. Of course, a system of government that was denied the authority to take final action would be too weak and inefficient to maintain itself or afford due measure of security and protection to the people who created and established it; and in many instances it would entirely fail to accomplish the purpose of its existence."

Continuing, the court said, referring to the Governor:

"For his conduct in ordering out and controlling the movements and operations of the state militia, the governor is answerable only at the bar of public opinion, unless it be that abuses might warrant impeachment proceedings."

We assume that the court in using the foregoing language meant that the Governor officially was answerable only at the bar of public opinion or by impeachment proceedings. It is believed that the authorities are clear that the Governor as an individual is responsible for his acts in using the soldiers both by civil and criminal prosecution, if the facts warrant such action, but this action must be taken, according to the decisions, after and not during the existence of Martial Law.

We next invite the court to consider those author-

ities which it is believed conclusively establish the truth of the proposition that the act of Appellants, in restricting the production of crude petroleum by Appellees, was not a taking of their property in violation of the 14th Amendment to the National Constitution.

It is believed that there is, under the police power, no greater responsibility resting upon a State than the one which requires or should require the State to maintain the majesty of the law, to suppress insurrection, to prevent insurrection, riot, tumult and general disorder. In doing this, it is believed that the State is exercising the supreme police power necessarily inherent in every government in order to preserve its own existence.

In Watson on the Constitution, Vol. 1, page 693, the following language is used:

"A state may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands."

As we understand the above language, it was not intended by the author to convey the thought that the State, through its judiciary department, would

determine what degree of force the crisis demands, but that he who by the Constitution is empowered to exercise military force would make these determinations, and that such determinations must necessarily require the exercise of discretion and judgment, a discretion and judgment which cannot be interferred with by any person or tribunal.

In the case of Marbury vs. Madison, supra, the great Chief Justice said:

"By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

"In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion."

The Governor of Texas has found as a fact that insurrection, and imminent danger thereof, does exist in the Counties of Gregg, Upshur, Rusk and Smith, in East Texas. This finding of fact by the Governor is conclusive, and cannot be controverted by any evidence.

Insurrection, and imminent danger thereof, being in existence, it is the duty of the Governor, acting for and on behalf of the State of Texas, to suppress such insurrection and to prevent further acts of insurrection, riot, tumult and general disorder. This creates a condition analogous to one of war. The life of the State is imperiled. It becomes the duty of the Governor to take such action as may be necessary in order that the insurrection and the danger thereof may cease to exist. The Governor, and he alone, must determine what action shall be taken. The stock examples of extreme exercise of police power are, that a house, the home of an innocent citizen, may be torn down or blown up to arrest or prevent the spreading of a fire; when the saloon business was a legal business licensed and authorized by the State, the saloons could be closed during riot, insurrection, or imminent danger thereof; private property may be seized and fortified against the approach or threatened approach of a public enemy. Private rights of individuals and corporations, the enjoyment and exercise of which are guaranteed by the Constitution, must in certain exigencies yield to the paramount needs of society, to the public welfare.

In New York vs. Town of Bristol, supra, this court said:

"It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United

States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury."

In Compagnie vs. Louisiana, supra, this court held that the 14th Amendment to the Constitution does not limit the power of the State "to exercise the police power in the preservation of the health, safety and morals of the country by enacting and enforcing quarantine measures, even if in their enforcement it may become necessary to take property, control its use, or restrain people of their liberty."

In Keely vs. Sanders, supra, this court held, in connection with war measures for the collection of taxes by military officers and tribunals, that public danger warrants the substitution of executive process for judicial process. Precisely the same thing was held in the Moyer case, supra.

In Minneapolis vs. Beckwell, supra, this court said:

"It is evident that the Fourteenth Amendment does not limit the subjects in relation to which the police power of the state may be exercised for the protection of the citizen."

In the case of Public Clearing House vs. Coyne, supra, this court declared:

"It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an executive department. Many, if not most, of the matters presented to these departments require for their proper solution the judgment or discretion of the head of the department, and in many cases, notably those connected with the disposition of the public lands, the action of the department is accepted as final by the courts, and even when involving questions of law this action is attended by a strong presumption of its correctness."

Continuing, the court said:

"That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and by many eminent writers upon the subject of constitutional limitations."

In the opinion of this court in the Public Clearing House case, the court quoted with approval the language used by Judge Cooley in Weimer vs. Bunbury, 30 Mich. 201, as follows:

"There is nothing in these words (due process of law), however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is

purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would not afford redress."

After quoting the above language of Judge Cooley, the opinion of this court continues as follows:

"If the ordinary daily transactions of the departments, which involve an interference with private rights, were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of the government."

In Atlantic Coast Line Ry. Co. vs. Goldsboro, supra, this court used the following language:

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

In the case now before the court, the State of Texas, acting through its Governor, by it authorized to determine these matters, is acting for the

safety, good order and general welfare of the community. It will not do to say, that no insurrection existed, hence no necessity for the use of soldiers. The Governor has determined, in the exercise of a discretion and judgment which the people have empowered him to exercise, that insurrection and imminent danger thereof does exist. He has determined that the laws are not being faithfully executed in the Military District, and, in order to cause these laws to be faithfully executed, it is necessary for him to call forth the militia for that purpose; and, he has also determined, in the exercise of his discretion and judgment, that it is necessary for him, in order to maintain the safety, good order and protect the general welfare of the community, to restrict the production of oil from Appellees' wells. Having exercised this judgment and discretion, which the law authorizes and empowers him to exercise, the exercise thereof by the Governor of Texas is a lawful act, and one which could not be enjoined by the court below without an abuse of judicial discretion.

The position here taken does not place the Governor above the law or above the courts. He remains subject to the law and answerable to the courts. He must obey the law and act within the law, and it is supposed, at least, that his official oath and the great powers and public confidence which have been reposed in him will restrain him

from any arbitrary or unlawful act; but, if however, he acts in violation of the law, he is subject to the law and answerable in the courts, that is, he is answerable in the courts of criminal jurisdiction for any violations of the criminal laws of the State or of the United States, he is answerable in damages, after the emergency has passed, at the suit of any injured individual, and he is answerable before a court of impeachment for any arbitrary or unlawful act. This latter court is as much a court as any other court; it is established by the Constitution of the State and is given final and complete authority in all cases within its jurisdiction. Therefore, the construction placed on the Constitution in this argument, and the power asserted to exist in the office of Governor of Texas, does not place him above the law and the courts, but it leaves him subject to both. It does, however, assert that a court of equity may not by injunction control the executive in the exercise of a discretion vested in him by the Constitution. That the people of Texas intended that the Governor should not be subject to the courts in the exercise of executive discretion is illustrated by the fact that the Constitution of Texas provides that the Governor shall not be subject to mandamus. If he were it would nullify the provision of the Constitution dividing the powers of government between the three co-ordinate departments of government.

As best we could, we have covered the points upon

which we rely for reversal of this case. If our contention finds support in the law as it is, we should prevail. If not, we cannot expect to.

The court's careful consideration is invited, and the cause is now respectfully submitted.

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SMITH, BROWNLEE & GOLDSMITH,
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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 453.

R. S. STERLING, GOVERNOR OF TEXAS, ET AL., APPELLANTS,

VS.

E. CONSTANTIN, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANTS.

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SUBJECT INDEX

	Page No.
Opinion of the trial court	1
Jurisdiction	2
Statement of the case	10
Specifications of Errors	19
Summary of Argument	24
Argument	26
Point A: Governor has power to declare martial law	26
Point B: Courts may not review sufficiency of facts on which martial law is declared	52
Point C: Courts may not control by injunction means of enforcing martial law	60
Point D: Finding of Governor of necessity to take property is due process of law	74
Power as civil officers theory	93
Ex parte Milligan (4 Wall. 2) discussed	94

TABLE OF CASES

Page No.

Alabama vs. United States, 279 U. S. 229 — 9
Barbier vs. Connolly, 113 U. S. 27 — 62
Burnquist vs. Minnesota, 168 N. W. 634, 3 A. L. R. 1476 — 64
Chapin vs. Ferry, 3 Wash. 386, 15 L. R. A. 116 — 56
Clark vs. Poor, 274 U. S. 554 — 9
Clearing House vs. Coyne, 194 U. S. 497 — 87
Compagnie vs. Louisiana, 186 U. S. 380 — 62
Constantin, et al., vs. Smith, et al., 57 Fed. (2d) 227 — 2
Consolidated Coal & Coke Co. vs. Beale, et al., 282 Fed. 934 — 55
Ex parte Jones, 71 W. Va. 567, 77 S. E. 1029, 45 L. R. A. (NS) 1030 — 56
Ex parte Lavinder, 108 S. E. 428 — 98
Ex parte McDonald, 49 Mont. 454, 143 Pac. 947, L. R. A. 1915 B, 988 — 45, 50
Ex parte Milligan, 4 Wall. 2 — 27, 28, 50, 94
Franks vs. Smith, 142 Ky. 232, 134 S. W. 484 — 57, 63, 70, 83
Hartranft's Appeal, 85 Pa. St. 433, 27 Am. Rep. 667 — 68, 78
Herkness vs. Irion, 278 U. S. 92 — 10
In re Boyle, 6 Idaho 609, 45 L. R. A. 832 — 57, 69, 83
In re Louis Crim, (unreported) — 94
In re Moyer, 35 Colo. 159, 85 Pac. 190, 12 L. R. A. (NS) 979 — 40, 55, 81, 93
Interstate Busses Corp. vs. Blodgett, 276 U. S. 245 — 9
Keely vs. Sanders, 99 U. S. 441 — 54
Louisiana vs. McAdoo, 234 U. S. 627 — 91
Luther vs. Borden, 7 How. 1 — 39, 53, 59, 80
Marberry vs. Madison, 1 Cranch 137 — 54
Martin vs. Mott, 12 Wheat. 19 — 38, 53, 63, 79
Mathews vs. Rodgers, 52 S. C. Rep. 217, 76 L. ed. 271 — 9
Mayes vs. Brown, 71 W. Va. 519, 77 S. E. 243, 45 L. R. A. (NS) 996 — 56, 70
Mitchell vs. Harmony, 13 How. 115 — 76, 84, 85, 86

Page No.

Mississippi vs. Johnson, 4 Wall. 475 90
Moyer vs. Peabody, 148 Fed. 870 82
Moyer vs. Peabody, 212 U. S. 78 ..... 43, 50, 53, 68, 81, 83
National Fire Ins. Co. vs. Thompson, 281 U. S. 331 10
Natural Fuel & Gas Co. vs. Pub. Serv. Com., 278 U. S. 322 10
Pacific Gas & Electric Co. vs. Police, 251 U. S. 22 62
Railroad Co. vs. Garrett, 231 U. S. 298 9
State vs. Brown, 71 W. Va. 519, 77 S. E. 243, 45 L. R. A. (NS) 996 ..... 56, 83
Stewart vs. Kahn, 78 U. S. 493 ..... 53, 54
United States vs. Adams, 26 Fed. (2d) 141 98
United States vs. Fischer, 280 Fed. 208 ..... 51, 65, 70, 82
United States vs. Russell, 13 Wall. 623 ..... 77, 84, 85, 86
United States vs. Wolters, 268 Fed. 69 ..... 45, 49, 82, 94
Van Dyke vs. Geary, 244 U. S. 39 9
Wadsworth vs. Shortall, 206 Pa. St. 165, 55 Atl. 952, 98 A. S. R. 759 69
Weimer vs. Bunbury, 30 Mich. 201 87

CONSTITUTIONS AND STATUTES

	Page No.
Constitution of Colorado, Art. IV, Sec. 2	40
Art. IV, Sec. 4	40
Constitution of Montana, Art. VII, Secs. 5, 6	44
Constitution of Texas, Art. I, Sec. 19	87
Art. II, Sec. 1	59
Art. IV, Sec. 1	29, 40
Art. IV, Sec. 7	29, 40, 60, 87
Art. IV, Sec. 10	29, 41
Constitution of United States, Art. I, Sec. 8	34
Art. II, Sec. 2	34
Art. IV, Sec. 4	60
Act of Feb. 28, 1795	34
Art. 5778, Revised Civil Statutes of Texas, 1925	29, 41
Art. 5830, Revised Civil Statutes of Texas, 1925	29, 41
Art. 5834, Revised Civil Statutes of Texas, 1925	30, 42
Art. 5889, Revised Civil Statutes of Texas, 1925	30, 43
Statute of Colo., Laws 1897, p. 204, Sec. 2	41
28 U. S. C. A., Sec. 345	4
Sec. 380	4, 5

TEXTBOOKS

Pomeroy's Constitutional Law	65
Story on the Constitution, Vol. 2 (2d Ed. 1851) p. 109	35
Vol. 2 (2d Ed. 1851) p. 110	54
Vol. 2 (2d Ed. 1851) Sec. 1211	57

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 453.

R. S. STERLING, GOVERNOR OF TEXAS, ET AL., APPELLANTS,

VS.

E. CONSTANTIN, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANTS.

I.

The opinion of the District Court of the United States for the Eastern District of Texas in this case

was written following the hearing of Appellees' application for an interlocutory injunction and in connection with the order of the Court granting such injunction. The opinion is reported in *Constantin et al. vs. Smith et al.*, 57 Fed. (2d) 227. The opinion also appears on pages 103, et seq., of the Transcript of the Record in *R. S. Sterling, Governor of Texas, et al., vs. E. Constantin et al.*, No. 11, October Term, 1932, being the Transcript of the Record on appeal from the order granting the interlocutory injunction.

II.

JURISDICTION.

Statement.

An appeal was taken from the order granting the interlocutory injunction. This appeal was filed in the Supreme Court of the United States on March 1, 1932, being No. 11, October Term, 1932, *R. S. Sterling, Governor of Texas, et al., appellants, vs. E. Constantin et al, appellees.* On this appeal a statement of the basis on which appellants contend the Supreme Court of the United States has jurisdiction to review on appeal the decree of the District Court of the United States for the Eastern District of Texas granting the interlocutory injunction was filed, as required by paragraph one of Rule 12 of the Supreme Court Rules.

An appeal has been taken from the final order of the District Court of the United States for the Eastern District of Texas in this case granting appellees a permanent injunction. This appeal from the decree granting the permanent injunction is No. 453, October Term 1932, *R. S. Sterling, Governor of Texas, et al., appellants, vs. E. Constantin, et al., appellees,* in the Supreme Court of the United States.

On October 17, 1932, this Court made an order consolidating the appeal from the order granting the interlocutory injunctions, with the appeal from the order granting the permanent injunction, and the consolidated case was set for submission and oral argument on November 14, 1932.

(In referring to the Transcripts of the Records in these appeals—now consolidated—appellants will in this brief, for the assistance of the Court, refer to the Transcript of the Record on the appeal from the temporary order as Transcript of Record, Volume 1; and to the Transcript of the Record from the appeal from the final order as Transcript of Record, Volume 2.)

Statement of Basis on Which Appellants Contend the Supreme Court of the United States Has Jurisdiction to Review on Appeal the Decrees of the United States District Court for the Eastern District of Texas, Granting the Interlocutory and Permanent Injunctions, From Which These Appeals (Now Consolidated) Have Been Taken.

(1)

The statutes believed to sustain appellate jurisdiction are Sections 238 and 266, Judicial Code (28 U. S. C. A., Secs. 345-380).

28 U. S. C. A., Sec. 345 (Sec. 238 Judicial Code) provides:

"A direct review by the Supreme Court of an interlocutory or final judgment or decree of a District Court may be had where it is so provided in * * * Section 380 of this title."

28 U. S. C. A., Sec. 380 (Sec. 266, Judicial Code) provides:

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges,

of whom at least one shall be a justice of the Supreme Court or a circuit judge, * * * An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. * * * and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

(2)

The decree granting the interlocutory injunction, after notice and hearing before a three judge court, organized as provided by Sec. 266 of the Judicial Code (28 U. S. C. A., Sec. 380), was entered on February 26, 1932. (Tr. of R., Vol. 1, p 102.)

The petition for appeal from the decree granting the interlocutory injunction was presented and allowed by the three judges constituting the court on February 26, 1932. (Tr. of R., Vol. 1, p. 396.)

The decree granting the permanent injunction, after notice and hearing before a three judge court, organized as provided by Sec. 266 of the Judicial Code (28 U. S. C. A., Sec. 380), was made on September 19, 1932. (Tr. of R., Vol. 2, p. 7.)

The petition for appeal from the decree granting the permanent injunction was presented and allowed by the three judges constituting the court on September 30, 1932. (Tr. of R., Vol. 2, p. 10.)

(3)

The decree of the Court granting the interlocutory injunction, from which the original appeal was taken, is found on page 102 of the transcript of the record (Vol. 1). The decree of the Court granting the permanent injunction, from which the second appeal was taken is found on page 7 of the Transcript of Record (Vol. 2).

(4)

The amended bill of complaint averred, among other things, that certain oil and gas conservation statutes of the State of Texas, purporting to give authority to the Railroad Commission of the State of Texas, after notice and hearing, to make orders fixing the amount of oil and gas that an operator of an oil and gas well could produce, were invalid because in violation of the Constitution of the United States, and that said orders made by the Railroad Commission, fixing the amount of oil that complainants could produce were likewise in violation of the Constitution of the United States; that a certain conspiracy existed to restrict the production of oil within certain limits; that the appellant R. S. Sterling was a party to such conspiracy; that he had declared "martial law" in the counties of Gregg, Upshur, Rusk and Smith, in the State of Texas; that with the aid and assistance of

appellant W. W. Sterling and appellant Jacob F. Wolters, he was enforcing certain orders made in pursuance of the declaration of "martial law"; that the orders were made and enforced in furtherance of a plan to restrict the production of oil for the purpose of affecting the price; that said orders were void, without justification in law and contrary to the Constitution of Texas and the Constitution of the United States; and that the appellants by the enforcement of such orders were taking the property of appellees in violation of the Fourteenth Amendment to the Constitution of the United States, in this, that by force of arms appellees were compelled to restrict the production of oil from each of the wells of appellees to one hundred (100) barrels of oil per day, when each of said wells was capable of producing, without physical waste, five thousand (5,000) barrels of oil per day. The appellees prayed for temporary and permanent injunctions. Appellees pleaded that the statutes of Texas, which appellants assert gave them power and made it their duty under existing conditions to use military force to suppress riot or insurrection and preserve peace, and which appellants averred they were acting under and enforcing in the use of military force, were, together with the military orders and the acts performed under them, in contravention of the Fourteenth Amendment to the Constitution of the United States. The appellees' pleading, as ap-

pellants construe it, is to the further effect that these statutes as construed and enforced by appellants, and the orders issued under them, are likewise in violation of the Fourteenth Amendment to the Constitution of the United States. (Tr. of R., pp. 48, 50, 54.)

Appellees' amended bill of complaint is found in the Transcript of the Record, Vol. 1, pages 19-48; their supplemental bill, in Vol. 1, pages 49-55.

Appellants answered and pleaded that "martial law" had been proclaimed by appellant R. S. Sterling under authority of the Constitution and laws of the State of Texas, to prevent riot and insurrection, or threatened riot and insurrection; that "martial law" was the means necessary to accomplish the suppression of riot and insurrection, or threatened riot and insurrection, and that such declaration and the orders so enforced were issued under constitutional and statutory authority and in the lawful discharge of duties imposed by law on the Governor. Appellees contended that appellants' acts were a violation of their constitutional rights under the Constitution of the United States. The answer of appellants to appellees' first amended bill of complaint is found in the Transcript of the Record, Vol. 1, pages 55-96.

The order granting the interlocutory injunction enjoined appellants "and all other persons acting for or with, or under the direction of them" from "enforcing against complainants any of their so-

called military or executive orders, passed or to be passed, regulating or restricting the production of oil from complainants' wells, or from in any manner, directly or indirectly, interfering with the lawful production of oil from complainants' property". (Tr. of R., Vol. 1, p. 102.)

The decree of the court granting the permanent injunction permanently enjoined appellants "and all other persons acting for or with, or under the direction of them" from "enforcing against complainants any of their so-called military or executive orders, passed or to be passed, regulating or restricting the production of oil from the oil wells of complainants, described in their bill of complaint, or from in any manner, directly or indirectly, interfering with the lawful production of oil from complainants' said oil wells." (Tr. of R., Vol. 2, p. 7.)

(5)

The cases relied upon to sustain the jurisdiction of the Supreme Court of the United States are:

Clark vs. Poor, 274 U. S. 554;
Mathews vs. Rodgers, 52 S. C. Rep. 217, 76 L. ed. 271;
Interstate Busses Corp. vs. Blodgett, 276 U. S. 245;
Van Dyke vs. Geary, 244 U. S. 39;
Railroad Co. vs. Garrett, 231 U. S. 298;
Alabama vs. United States, 279 U. S. 229;

Natural Fuel & Gas Co. vs. Public Service Commission, 278 U. S. 322;

National Fire Ins. Co. vs. Thompson, 281 U. S. 331; and

Herkness vs. Irion, 278 U. S. 92.

III.

STATEMENT OF THE CASE.

Appellant R. S. Sterling, Governor of Texas, issued an executive proclamation on August 16, 1931, proclaiming a state of insurrection, tumult, riot and breach of the peace, and imminent danger of insurrection, tumult, riot and breach of the peace, to exist in Gregg, Upshur, Rusk and Smith Counties, Texas. It was stated in the proclamation that "there is now imminent danger of said insurrection, tumult, riot and breach of the peace threatening serious danger to citizens and their property, being extended not only in the territory heretofore described, but in other areas of this State where oil and natural gas are being produced by operators who are obeying the laws relating to the conservation of crude petroleum oil and natural gas". (Tr. of R., Vol. 1, p. 92.)

The proclamation directed that the appellant "Jacob F. Wolters assume supreme command of the situation in the territory affected and without delay shut down each and every producing crude oil well and/or producing well of natural gas, and to

further take such steps as he may deem necessary to enforce and uphold the majesty of the law, subject to the orders of the Governor of Texas" * * *. (Tr. of R., Vol. 1, p. 93.)

The Railroad Commission of Texas, vested with authority to enforce the conservation laws of the State in regard to the production of oil, made and caused to be entered on September 2, 1931, an order fixing the amount of oil that could be produced from any producing oil well in either Gregg, Upshur, Rusk or Smith Counties, Texas, at two hundred twenty-five (225) barrels per day. The appellant R. S. Sterling then issued a proclamation permitting the wells to be opened and to produce at the rate fixed by the order of the Railroad Commission of Texas. (Tr. of R., Vol. 1, pp. 34, 78.)

Another order was made and promulgated by the Railroad Commission of Texas on September 18, 1931, restricting the production of oil from wells in the counties named to one hundred eighty-five (185) barrels per well per day; and on October 10, 1931, another order was entered by the Railroad Commission of Texas, further reducing the daily well allowable of crude oil to one hundred sixty-five (165) barrels. These orders each expired under their terms on October 31, 1931. In each instance the appellant R. S. Sterling directed his officers in the area in which "martial law" had been declared to enforce these orders of the Railroad Commission of

Texas. (Tr. of R., Vol. 1, pp. 38, 39, 78, 97, 98, 99.)

On October 29, 1931, the appellant R. S. Sterling issued an order directing the appellant Wolters, the officer he had placed in charge of the territory affected by "martial law," to limit the production from wells in that area to one hundred fifty (150) barrels of oil per well per day. In this order or proclamation it was stated:

"Whereas I have received advice and information believed by me to be reliable and true, to the effect that there is much dissatisfaction among land owners and small operators because of the foregoing conditions, and that if such conditions are permitted to continue the result will be acts of violence, breach of peace, disorder, possible destruction of property, and serious interference with the suppression of insurrection, to suppress which Martial Law was declared in said counties, effective August 17, 1931, and which is now and has at all times since said date been in full force and effect; and,

"Whereas I believe that it is necessary, as a precaution against acts of insurrection, riot, breach of peace, tumult and general disorder, of which there is imminent danger in the aforesaid counties, and that it is a proper measure and the only means at my command to suppress the existing insurrection in said counties and prevent further acts of insurrection, riot, tumult, breach of peace and general disorder in said counties, and to remove the existing

imminent danger of such unlawful acts in said counties, for me to cause oil production from each oil well in said counties to be limited and restricted for the present to 150 barrels of oil per day;" * * *. (Tr. of R., Vol. 1, p. 94.)

On November 6, 1931, appellant R. S. Sterling issued an order to the appellant Wolters to restrict the production of oil from wells in the area affected by the proclamation of "martial law" to one hundred twenty-five (125) barrels per well per day. And, on December 10, 1931, he issued another order further reducing said production to one hundred (100) barrels of oil per well per day. (Tr. of R., Vol. 1, pp. 95, 96.)

Appellees' amended pleadings averred, among other things, that the statutes of the State of Texas, by authority of which the Railroad Commission of Texas acted in making the orders fixing the amount of oil that an operator could produce from his wells, were invalid because the same contravened the Constitution of the United States and that the orders made under the statutes by the Railroad Commission of Texas were violative of the Constitution of the United States (Tr. of R., Vol. 1, p. 31); that there existed a conspiracy to restrict the production of oil, with the view of affecting the market or sale price of the commodity; that the appellant R. S. Sterling and the members of the Railroad Commission of Texas were parties to the said conspiracy

(Tr. of R., Vol. 1, pp. 28, 36, 38); that the appellant R. S. Sterling had by proclamation declared "martial law" and with the aid and assistance of the appellants W. W. Sterling and Jacob F. Wolters were taking the property of appellees without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States; that the statutes of the State of Texas, under which the appellant R. S. Sterling purported to act in issuing the proclamation of "martial law" and under which he issued said orders and used military force to suppress the declared insurrection and danger of insurrection and to restore the peace, were in violation of the Constitution of the United States. (Tr. of R., Vol. 1, pp. 48, 49-54.)

The answer of the Railroad Commission of Texas, among other things, alleged that the orders of the Railroad Commission of Texas, which were sought to be enjoined, had by their own terms expired on August 31, 1931, and that the Railroad Commission of Texas was not at the time of the filing of the answer attempting or threatening to enforce any of such orders. (Tr. of R., Vol. 1, p. 99.) No interlocutory injunction was issued as against the Railroad Commission of Texas. (Tr. of R., Vol. 1, p. 102.)

Appellants answered, among other things, that the various orders and proclamations above mentioned had been issued; that the appellant R. S.

Sterling as chief civil magistrate and Commander-in-Chief of the military forces of the State of Texas was charged by the Constitution and laws of Texas with the duty of causing the laws to be faithfully executed and that for such purpose he was authorized by the Constitution and laws of the State to employ its military forces; that for the purpose of suppressing "the then existing state of insurrection, tumult, riot, and breach of peace, and preventing insurrection, riot, tumult, and breach of peace, which were imminent in Gregg, Upsur, Rusk and Smith Counties, Texas", he issued the proclamation declaring "martial law" in said counties under the authority granted him by the Constitution and statutes of Texas and in obedience to the duty imposed upon him by these laws; that the various proclamations and orders issued by the appellant R. S. Sterling and executed by the other appellants were issued and executed under such proclamation declaring "martial law" and for the purpose of restoring the peace and suppressing insurrection or riot or the imminent danger thereof. (Tr. of R., Vol. 1, pp. 76-90.)

Appellees' application for an interlocutory injunction was heard in Houston, Texas, on January 4, 1932, before a three judge court, organized as provided by Sec. 266 of the Judicial Code, and thereafter, on February 26, 1932, said court granted an interlocutory injunction restraining the appellants

in the manner and to the extent previously pointed out. (Tr. of R., Vol. 1, p. 120.)

The case was submitted on its merits and for final decree at Houston, Texas, on May 30, 1932, before a three judge court, organized as provided by Sec. 266, of the Judicial Code, and composed of the same members as the court which had heard appellees' application for an interlocutory injunction. (Tr. of R., Vol. 1, p. 102; Tr. of R., Vol. 2, p. 1). It was submitted under the terms of a stipulation between appellants and appellees to the effect that:

(1) There should be a severance of the appellees' cause of action as between appellees and appellants, and as between appellees and the other parties named in appellees' bill of complaint; that the suit should proceed to trial and final judgment on existing pleadings as between appellees and these appellants as though no other parties were named in the pleadings; that the suit as between appellants and appellees should be treated as a separate suit from the suit of appellees against all other persons named as defendants in appellees' bill of complaint, the same as though it had been separately filed against the other defendants; that separate final judgments should be entered as between appellees and the appellants and as between appellees and other defendants named in appellees' bill; and, that the respective parties to the separate judgments might appeal

separately from the respective judgments when entered.

(2) That the suit as between appellants and appellees was submitted to the court to be decided on its merits on existing pleadings and on the record of evidence introduced at the trial upon the application for an interlocutory injunction; that the court should enter final judgment as between appellants and appellees; and, that either appellees or appellants might prosecute an appeal from said judgment the same as though they were the only parties named in appellees' bill.

(3) That in any appeal from final judgment as between appellants and appellees, either or any of them might use the transcript of the record in the appeal from the decree granting the interlocutory injunction as the record on appeal from the final order entered as between appellants and appellees; that any party or parties appealing from such final order might, in addition to the record in the appeal from the decree granting the interlocutory injunction, take up as additional parts of the record the stipulation, the final judgment of the court, and such bonds and other parts of the record as the appealing party might desire; and, that the record on file in the appeal from the order granting the interlocutory injunction was a true and correct Transcript of the Record on appeal from the order granting the interlocutory injunction.

(4) That the appeal from the final order should be consolidated in the Supreme Court of the United States with the appeal taken from the decree granting the interlocutory injunction.

This stipulation was signed by the attorneys for all parties to the suit, and approved by each of the judges of the court, and filed with the clerk. (Tr. of R., Vol. 2, p. 1.)

The final decree of the three judge court was made in this case on September 19, 1932, granting a permanent injunction to appellees against appellants to the effect previously stated. (Tr. of R., Vol. 2, p. 7.)

In connection with the appeal from the decree granting the permanent injunction, it was stipulated, with the approval of the court:

(1) That the printed transcript of the record in the appeal from the interlocutory injunction contains a true and correct statement of all substantial and material evidence given on the hearing at the time the case was tried on its merits.

(2) That "the transcript of the record of all pleadings and the evidence now on file in the Supreme Court of the United States on the appeal of the Defendants herein from the interlocutory injunction heretofore granted shall be and does constitute a full and complete record and transcript of all proceedings had, including pleadings and evi-

dence, before the three-judge court at the time this cause was tried on its merits".

(3) That it shall not be necessary in perfecting an appeal from the decree granting the permanent injunction to bring forward and file a transcript of the pleadings and evidence upon which this case was tried for the reason that it is now on file in the appeal from the order granting the interlocutory injunction. (Tr. of R., Vol. 2, pp. 4.)

IV.

SPECIFICATIONS OF ERRORS.

Statement.

The errors assigned in the appeal from the decree granting the interlocutory order have been specified and briefed in connection with that appeal and the appellants will here specify the errors assigned to the decree of the court granting the permanent injunction.

1.

The court erred in finding that the defendant and appellant R. S. Sterling, as Governor of the State of Texas, had no authority under the Constitution and laws of the State of Texas to declare martial law. (Appellants' 6th Assignment of Error, Tr. of R., Vol. 2, p. 12.)

2.

The court erred in finding that it had jurisdiction to inquire into and determine whether, as a matter of fact, an insurrection or riot, or imminent danger thereof, existed in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, at a time when the Governor of Texas, in the exercise of his discretion and judgment, had determined that an insurrection and riot, or imminent danger thereof, did exist, and had by proclamation declared martial law, which was in force and effect at the time of the hearing and decision of this case, and which was declared for the purpose of suppressing and preventing insurrection and riot in said Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas. (Appellants' 2nd Assignment of Error, Tr. of R., Vol. 2, p. 11.)

3.

The court erred in holding that it had jurisdiction to review, inquire into, and control by injunction the means employed by the defendant and appellant, R. S. Sterling as Governor of Texas, under martial law, to suppress the insurrection and riot, and imminent danger thereof, found and declared by him to exist in his proclamation declaring martial law, in the Counties of Gregg, Ppshur, Rusk and Smith, in the State of Texas, and in substituting its

judgment and discretion for that of the Governor of Texas in determining the means to be employed under martial law to suppress the riot and insurrection, and imminent danger thereof, found to exist in the proclamation declaring martial law. (Appellants' 11th Assignment of Error, Tr. of R., Vol. 2, p. 13.)

4.

The court erred in finding that it had jurisdiction to hear, determine and grant the injunction against these defendants, the Governor of Texas, the Commanding Officer of the military forces of the State of Texas, and the Adjutant General of the State of Texas. (Appellants' 1st Assignment of Error, Tr. of R., Vol. 2, p. 11.)

5.

The court erred in finding that the restriction placed by the Governor upon the production of crude petroleum by the plaintiffs, during the existence of martial law under the Constitution and stautes of Texas, as a means of preventing and suppressing insurrection and riot, or imminent danger thereof, was a taking of the plaintiffs' property or a trespass upon the property rights of the plaintiffs, in violation of the Fourteenth Amendment to the Constitution of the United States. (Appellants' 7th Assignment of Error, Tr. of R., Vol. 2, p. 12.)

6.

The court erred in granting the injunction against these defendants and appellants, enjoining them, and each of them, in their official capacity, from interfering with the production of oil by plaintiffs from land situated in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, at a time when, according to the judgment and discreton exercised by the defendant and appellant, R. S. Sterling as Governor of the State of Texas, there was insurrection, riot and tumult, and imminent danger thereof, in said counties, and at a time when by proclamation of the Governor martial law was being maintained and enforced in said counties. (Appellants' 9th Assignment of Error, Tr. of R., Vol. 2, p. 13.)

7.

The court erred in granting the injunction as against these defendants and appellants, and as against each of them, because the judgment, order or decree of the court, granting such permanent injunction, is without support, either in the facts or by the law of this case. (Appellants' 10th Assignment of Error, Tr. of R., Vol. 2, p. 13.)

8.

The court erred in finding that the evidence showed no insurrection or riot existed in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, on August 16, 1931, or on October 13, 1931, or at the time this cause was heard and decided by this court. (Appellants' 3rd Assignment of Error, Tr. of R., Vol. 2, p. 12.)

9.

The court erred in finding that there was no warrant in the evidence for the belief, on the part of the defendants and appellants R. S. Sterling and Jacob F. Wolters that there was imminent danger of insurrection or riot in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, on August 16, 1931, or on October 13, 1931, or at the time this case was heard and decided by this court. (Appellants' 4th Assignment of Error, Tr. of R., Vol. 2, p. 12.)

10.

The court erred in finding that the defendant and appellant R. S. Sterling, as Governor of Texas, had ousted the Railroad Commission of the State of Texas from the exercise of its jurisdiction in the matter of enforcing the conservation laws of the

State of Texas, as applied to the production of crude petroleum. (Appellants' 5th Assignment of Error, Tr. of R., Vol. 2, p. 12.)

V.

SUMMARY OF ARGUMENT.

Point A. The Constitution and statutes of Texas authorize the Governor and vest in him discretion to declare a state of insurrection to exist in a defined area of the State and to employ the military forces of the State to suppress insurrection, tumult, riot or breach of the peace and to repel invasion. The authority, power and discretion vested in the Governor by these provisions of the Constitution and statutes are sufficient to authorize and empower him, when in his judgment and discretion it appears necessary to the discharge of his duties in preserving the peace, in protecting life and property and in causing the laws to be executed, to declare "martial law" as that term is understood and the acts which may be done under its declaration are declared in the jurisprudence of this country. The proclamation of August 16, 1931, was effective to declare "martial law" in Gregg, Upshur, Rusk and Smith Counties, Texas.

Point B. When the Governor of Texas, in the exercise of his discretion, determines that a state of insurrection exists, or that there is imminent

danger thereof, in a defined area and exercises the power of the office to proclaim the existence of such insurrection, or the imminent danger thereof, and calls the military forces into active service and directs such forces to suppress the declared insurrection, or imminent danger thereof, his declaration of the existence of the insurrection, or the danger thereof, is conclusive upon the courts during the period of the declared emergency and they may not on an injunction proceeding inquire into either the sufficiency of the facts to sustain the declaration or the motive of the Governor in making it. These powers are vested in the Governor exclusively by the Constitution and statutes of the State.

Point C. When the Governor of Texas issues his proclamation declaring a state of insurrection, riot, tumult and breach of the peace, or imminent danger thereof, to exist in a defined area and as Commander-in-Chief of the military forces of the State calls them into active service to suppress such conditions, he may make the ordinary use of the soldiers and direct them to do whatever appears to him to be reasonably necessary at the time to suppress the insurrection and restore the peace; and the courts may not, during the period of the declared emergency, by writ of injunction, control the details of the Governor's exercise of this power of government or the details of his use of the soldiers; under such circumstances the courts cannot by injunction sub-

stitute their judgment and discretion for that of the Governor in determining the means to be employed in suppressing or averting the existing or impending riot and insurrection.

Point D. The State, acting through the Governor, may take private property located in the area in which insurrection, riot, tumult and breach of the peace, or imminent danger thereof, have been declared by proclamation to exist. The decision of the Governor that the taking of private property is necessary to prevent the impending insurrection, riot, tumult and breach of the peace, or to suppress the existing insurrection, riot, tumult and breach of the peace, is conclusive, and a taking under such circumstances is with due process of law.

VI.

ARGUMENT.

Point A.

The Constitution and statutes of Texas authorize the Governor and vest in him discretion to declare a state of insurrection to exist in a defined area of the State and to employ the military forces of the State to suppress insurrection, tumult, riot or breach of the peace and to repel invasion. The authority, power and discretion vested in the Governor by these provisions of the Constitution

and statutes are sufficient to authorize and empower him, when in his judgment and discretion it appears necessary to the discharge of his duties in preserving the peace, in protecting life and property and in causing the laws to be executed, to declare "martial law" as that term is understood and the acts which may be done under its declaration are declared in the jurisprudence of this country. The proclamation of August 16, 1931, was effective to declare "martial law" in Gregg, Upshur, Rusk and Smith Counties, Texas.

Appellants desire that there be no misapprehension upon the part of the Court as to their meaning in the use of the term "martial law" where it appears in this brief and argument.

In the course of his dissenting opinion in *Ex Parte Milligan*, 4 Wall. 2 (exact page 142), Chief Justice Chase said:

"There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within States or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of States maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction

under military law, and is found in Acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as military government, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander, under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated martial law proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights."

In using the term "martial law" appellants refer to the third kind of military jurisdiction spoken of in the above quotation: that is, "martial law" "called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights". Except, of course, appellants refer to "martial law" as called into action by the Chief Executive of a State and not as called into action by Congress or The President.

The provisions of the Constitution and statutes of Texas, upon which appellants rely for authority of the Governor to proclaim "martial law" in a defined area, are:

Constitution of Texas: Art. IV, Sec. 1. "The Executive Department of the State shall consist of a Governor, who shall be the Chief Executive Officer of the State," * * *

Art. IV, Sec. 7. "He (the Governor) shall be Commander-in-Chief of the military forces of the State, except when they are called into actual service of the United States. He shall have power to call forth the militia to execute the laws of the State, to suppress insurrections, repel invasions, and protect the frontier from hostile incursions by Indians or other predatory bands."

Art. IV, Sec. 10. "He (the Governor) shall cause the laws to be faithfully executed" * * *.

Statutes of Texas: Art. 5778, Revised Civil Statutes, 1925. "The Governor shall have power in the case of insurrection, invasion, tumult, riot or breach of peace, or imminent danger thereof, to order into the active service of this State any part of the militia that he may deem proper." * * *

Art. 5830, Revised Civil Statutes, 1925. "When an invasion of, or an insurrection in, this State is made or threatened, or when the Governor may deem it necessary for the enforcement of the laws of this State, he shall call forth the active militia or any part thereof to repel, suppress, or enforce the same, and if the number available is insufficient he

shall order out such part of the reserve militia as he may deem necessary."

Art. 5834, Revised Civil Statutes, 1925. "The Governor may order the active militia, or any part thereof, to assist the civil authorities in guarding the prisoners, or in conveying prisoners from and to any point in this State, or discharging other duties in connection with the execution of the law as the public interest or safety at any time may require."

Art. 5889, Revised Civil Statutes, 1925. "Whenever any portion of the military forces of this State is employed in aid of the civil authority, the Governor, if in his judgment the maintenance of law and order will thereby be promoted, may, by proclamation, declare the county or city in which the troops are serving, or any special portion thereof, to be in a state of insurrection."

The appellants rely upon the proclamation of the Governor issued on August 16, 1931, as being effective to proclaim and establish "martial law" in the area in which appellees' property was located.

The following are pertinent parts of this proclamation:

"Whereas from facts presented to me by many responsible citizens including resolutions adopted at a meeting of producers and royalty owners of East Texas oil field on August 14, 1931, and representations made by a committee of citizens who called upon me and submitted facts as to the conditions that obtained in said East Texas oil field, *it is evident that:*

"There exists an organized and entrenched group of crude petroleum oil and natural gas producers in said East Texas oil field, covering areas within the counties of Upshur, Rusk, Gregg and Smith who are in a state of insurrection against the conservation laws of the State relating to the prevention of waste of crude petroleum oil and natural gas, and are in open rebellion against the efforts of the constituted civil authorities of this State to enforce such laws; and that

"As evidenced by a telegram in my hand from the Sheriff of Rusk County the sheriffs of the counties in the district defined have not a sufficient force, and under the very nature of our government could not have a sufficient force to compel operators and producers of crude petroleum oil and natural gas to obey said law, it being utterly impossible with the forces at the command of the sheriffs or other civil authorities to enforce either the orders of the Railroad Commission of Texas or the laws pertaining to the waste of crude petroleum oil or natural gas against an entrenched group of insurrectionists such as are violating the law in the territory defined; and that

"The first called session of the Forty-second Legislature enacted a new conservation law amending existing statutes; and in order to give the Railroad Commission of Texas sufficient time to have hearings and promulgate proper orders providing for the conservation of crude petroleum oil and natural gas in the district above defined during which time without the presence of protecting authority the crude petroleum oil and natural gas in said district are being unlawfully dissipated and wasted and *the*

land owners and royalty owners being robbed of their royalties by unscrupulous and lawless producers, transporters and operators; and that

"By reason of the reckless, unlawful and criminal handling of producing wells in said district water is being rapidly drawn into the oil sands, thereby creating enormous physical waste of crude petroleum oil, and more than 1,000,000,000 cubic feet of natural gas, rich in gasoline content, are being wasted, all of which causes a great loss of revenue to this State, and does, and will, affect the welfare of our educational institutions, including our common schools, eleemosynary institutions, and each and every state department of the State Government and will increase the burdens of taxation upon our people generally; and that

"*The existing condition has brought about a state of public feeling on the part of citizens, that if the State Government cannot or fails to protect the public interest and the interest of the land and royalty owners they will attempt to take the law into their own hands, and by force of arms shut down the producing oil wells in said defined district until the State can and will enforce the conservation laws;* and that

"In at least one instance, as reported to me, an oil company operating in said defined district has ordered representatives of the Oil and Gas Division of the Railroad Commission of Texas who were performing their lawful and official duties from their leases; and

"Whereas *this condition has caused threats of acts of violence on the part of indignant responsible citizens against those who openly, flagrantly and*

rebelliously violate the laws and defy the constitutional civil authorities of this State; and

"Whereas *a state of insurrection, tumult, riot and breach of the peace does exist in the defined area;* and

"Whereas *in addition to the insurrection, tumult, riot, and breach of the peace that does now exist in the said defined area, there is now imminent danger of said insurrection, tumult, riot and breach of the peace threatening serious danger to citizens and their property being extended not only in the territory heretofore described, but in other areas of this State where oil and natural gas is being produced by operators who are obeying the laws relating to the conservation of crude petroleum oil and natural gas;* and"

* * *

"*Now, therefore, I, R. S. Sterling, Governor of the State of Texas*" * * * "*declare that the conditions above described do exist and are clearly violative of the Constitution and laws of this State*", * * *

"*And I do hereby declare Martial Law in said territory,*" * * *. (Tr. of R., Vol. 1, pp. 90-93.) *(Italics ours.)*

Chief Justice Chase said in *Ex Parte Milligan supra*, that the third kind of military jurisdiction of which he spoke might "be denominated martial law proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or

invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights." This indicates that Chief Justice Chase thought that "martial law" could be called into action by Congress or that it could be called into action under certain circumstances by The President. Where is Congress and where is The President to find authority for invoking "martial law" within districts or localities where ordinary law no longer adequately secures public safety and private rights"?

Article I, Sec. 8 of the Constitution of the United States provides:

"The Congress shall have power: * * * * to provide for calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasions."

Article II, Sec. 2 of the Constitution of the United States provides:

"The President shall be Commander-in-Chief of the Army and Navy of the United States and of the militia of the several states when called into actual service of the United States."

The Act of February 28, 1795, provided that:

"In case of an insurrection in any state against the government thereof, it shall be lawful for The

President of the United States on application of the Legislature of such state or of the Executive (when the Legislature cannot be convened) to call forth such number of the militia of any other state, or states, as may be applied for as he may judge sufficient to suppress such insurrection."

It was further provided by Congress in 1795:

"'That whenever the United States shall be invaded, or be in imminent danger of invasion, from any foreign nation or Indian tribe, it shall be lawful for the president to call forth such number of the militia of the state or states most convenient to the place of danger, or scene of action, as he may judge necessary, to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper,' and like provisions are made for the other cases stated in the constitution." *(Story on the Constitution*, Vol. 2, p. 109, Second Edition, 1851.)

Evidently Chief Justice Chase, in speaking of "martial law" called into action by The President, had in mind these provisions of the Constitution and acts of Congress.

One does not find the words "martial law" used in either of the provisions above quoted, but nevertheless it is through and under them that provision is made for authority to suppress insurrection and repel invasion through the use of military force.

Executive and departmental constructions are valuable as persuasive authority in some jurisdictions, and they are given this force because it is supposed that public officers will not attempt to disobey the law, but rather that they will endeavor to honestly and properly construe it and faithfully obey it. Especially is it to be supposed that a President of the United States will use extreme care to stay within the limitations imposed by law upon the powers of office. It is because of this presumption or supposition that the act of President Cleveland in using soldiers in Chicago and the threat of President Theodore Roosevelt to use them during the coal strikes in Pennsylvania are of value as authority that The President of the United States may call into action "martial law." These men evidently believed this power existed in the office of President and their belief must have been induced by these constitutional and statutory provisions that do not use the term "martial law."

A comparison of these provisions of the Constitution of the United States and of the act of Congress with the provisions of the Constitution and the acts of the Legislature of Texas is most respectfully invited.

The President of the United States is made Commander-in-Chief of the militia. Congress is given power to provide for calling forth the militia to execute the laws, suppress insurrections and repel in-

vasions. Congress has enacted statutes authorizing the President of the United States to use the militia to repel invasions, suppress rebellions and insurrections and to enable him to execute the laws. The Governor of Texas is made the Commander-in-Chief of the military forces of the state; he is directed to cause the laws to be faithfully executed, and is given power to call forth the militia to execute the laws of the state, to suppress insurrections and repel invasions. The statutes provide that he may by proclamation declare the existence of a state of insurrection.

If the above quoted provisions of the Constitution of the United States and the acts of Congress are effective to vest in the President of the United States the power to declare "martial law," and evidently Chief Justice Chase so construed them, then it would logically follow that analogous provisions in the Constitution and statutes of Texas confer a similar power upon the Governor of the State of Texas.

Incidents recorded in history of the misuse of power under "martial law" and an anticipation that history may repeat itself in this respect have caused some to deny that the executive has the power to declare "martial law," but their denials must find support in the fears which they express rather than in the laws of the land. The statement that a power may be abused does not argue against its existence,

and if it did, the argument would be equally effective to deny the existence of power in any officer or body of officers, and its logical end would be society reduced to its original elements with every man his own ruler and monarch. It begs the question to say that the government is without power to meet and suppress insurrections or other lawlessness with a superior force because the power might be abused, or that soldiers may not be called into action by the executive if the emergency is deemed by him to justify that end because such authority might be misused. It denies to the government the power to protect its citizens and continue its existence in the face of revolt, to say that its founders entertained such fear of the misuse of power that they withheld from the government authority to use adequate force at the call of the executive to maintain the peace and preserve life and property.

While the power is necessarily an overriding one, since its use is intended to be exercised in times of peril for the preservation of the government, the enormity of the power or the danger of its abuse do not argue against its existence. Mr. Justice Story aptly stated in *Martin vs. Mott*, 12 Wheat. 19, that:

"It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government the

danger must be remote since in addition to the high qualities which the executive must be presumed to possess of public virtue and honest devotion to the public interests, the frequency of elections and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny."

What was said by Chief Justice Taney in *Luther vs. Borden,* 7 How. 1, effectively disposes of any suggestion that the power may be abused. The reasons he stated for this power and responsibility being reposed in the President apply with equal force to the Governor of Texas.

"It is said that this power in the President is dangerous to liberty and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe and at the same time equally effectual. When citizens of the same state are in arms against each other and the constituted authorities unable to execute the laws the interposition of the United States must be prompt or it is of little value; the ordinary course of proceedings in courts of justice would be utterly unfit for the crisis; and the office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a willful abuse of power as human prudence and foresight could well provide."

The case of *In re Moyer*, 35 Colo. 159, 85 Pac. 190, 12 L. R. A. (NS) 979, is an authority of force to sustain appellants' position that the Constitution and statutes of Texas empower the Governor of Texas to proclaim "martial law." In connection with the holding of the court in this case that the Governor of the State of Colorado had the right, under the Constitution and laws of that state, to call out troops and restrain Moyer of his liberty, appellants invite a comparison of the pertinent provisions of the Constitution of Texas with those of the Constitution of Colorado and of the pertinent statutes of this state with those of Colorado.

CONSTITUTION OF TEXAS.	CONSTITUTION OF COLORADO.
Art. IV, Sec. 1. "The Executive Department of the State shall consist of a Governor, who shall be the Chief Executive officer of the State," * * * *.	Art. IV, Sec. 2. "The supreme executive power of the State shall be vested in the governor, who shall take care that the laws be faithfully executed."
Art. IV, Sec. 7. "He (the Governor) shall be Commander-in-Chief of the military forces of the State, except when they are called into actual service of the United	Art. IV, Sec. 4. "The Governor shall be Commander-in-Chief of the military forces of the State, except when they shall be called into actual service of the United

States. He shall have power to call forth the militia to execute the laws of the State, to suppress insurrections, repel invasions, and protect the frontier from hostile incursions by Indians or other predatory bands."

Art. IV, Sec. 10. "He (the Governor) shall cause the laws to be faithfully executed," * *.

STATUTES OF TEXAS.

Art. 5778, Revised Civil Statutes, 1925. "The Governor shall have power in the case of insurrection, invasion, tumult, riot or breach of peace, or imminent danger thereof, to order into the active service of this State any part of the militia that he may deem proper." * * * *

Art. 5830, Revised Civil

States. He shall have power to call out the militia to execute the laws, suppress insurrection or repel invasion."

STATUTE OF COLORADO

Laws 1897, page 204, Sec. 2 (Sec. 4424, Revised Statutes, 1908). "When an invasion of or an insurrection in the state is made or threatened the Governor shall order the National Guard to repel or suppress the same; *provided*, That when the emergency is great and time will not admit of communication with the Governor, the command-

Statutes, 1925. "When an invasion of, or an insurrection in, this State is made or threatened, or when the Governor may deem it necessary for the enforcement of the laws of this State, he shall call forth the active militia or any part thereof, to repel, suppress, or enforce the same, and if the number available is insufficient he shall order out such part of the reserve militia as he may deem necessary."

Art. 5834, Revised Civil Statutes, 1925. "The Governor may order the active militia, or any part thereof, to assist the civil authorities in guarding prisoners, or in conveying prisoners from and to any point in this State, or discharging other duties in connection with the execution of the law as the public interest or safety at any time may require."

ing officer of any portion of the National Guard stationed at the scene of trouble may assemble his command and after taking steps to notify the Governor in the most speedy manner possible, aid the civil officers in repelling invasion or suppressing insurrection."

Art. 5889, Revised Civil Statutes, 1925. "Whenever any portion of the military forces of this State is employed in aid of the civil authority, the Governor, if in his judgment the maintenance of law and order will thereby be promoted, may, by proclamation, declare the county or city in which the troops are serving, or any special portion thereof, to be in a state of insurrection."

In the later case of *Moyer vs. Peabody*, 212 U. S. 78, it was stated:

"In such a situation we must assume that he had a right under the State Constitution and laws to call out troops as was held by the Supreme Court of the State. The Constitution is supplemented by an act providing that 'when an invasion of or insurrection in the State is made or threatened the Governor shall order the National Guard to repel or suppress the same.' That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace."

Mr. Justice Holmes did not state in his opinion that the Supreme Court of the United States was bound by the construction placed upon the Constitution and laws of Colorado by the Supreme Court of that State, and though that may have been the case; nevertheless, it appears that he concurred in the construction placed upon the statutes and Constitution of Colorado by the Supreme Court of that State.

Under "martial law" the Governor may call out the troops; may order them to kill persons who resist and may cause offenders and insurrectionists to be restrained of their liberty. Regardless of whether the proclamation of the Governor of Colorado established a state of "martial law" in name, it appears from the opinion of Justice Holmes and from the opinion of the Supreme Court of Colorado that the governor had a power under his proclamation that could be exercised by him only under "martial law."

The Constitution of Montana provides that,

"The supreme executive power of the State shall be vested in the Governor, who shall see that the laws are faithfully executed. The Governor shall be Commander-in-Chief of the military forces of the State," * * * "and shall have power to call out any part, or the whole, of said forces to aid in the execution of the laws to suppress insurrection or to repel invasion." *(Constitution of Montana*, Art. VII, Secs. 5, 6.)

In *Ex Parte McDonald*, 49 Mont. 454, 143 Pac. 947, L. R. A. 1915 B, 988, the Supreme Court of that State, in connection with this provision of the Constitution, said:

"The Governor had the authority to proclaim a state of insurrection to exist in the County of Silver Bow, and to detail the organized militia of this state to suppress such insurrection, is settled by the express language of our Constitution."

It is respectfully urged that the Constitution of Montana confers no more power upon the Governor of that State than is conferred upon the Governor of Texas by the Constitution and statutes of this State.

There is one decided case which holds that the Governor of Texas has authority under the Constitution and laws of this State to institute "martial law." In *United States vs. Wolters*, 268 Fed. 69, Judge Foster said:

"There is no doubt that under the Constitution and laws of Texas the Governor is charged with the duty of enforcing the laws of the State, and has the authority to call out the militia to enforce the laws in case of riot, or breach of the peace, or imminent danger thereof." * * * *"I must conclude that the Governor had complete authority to institute martial law* in the city of Galveston. That is conceded by the relator. Since he had the authority to institute martial law, notwithstanding there is not statute of the State of Texas authorizing him to do

so, he could do anything necessary to make his proclamation effective." *(Italics ours.)*

The Government of Texas was not organized with the thought that it should last but for the day of its beginning. It was moulded and shaped and formed with the purpose that it should have an enduring existence and render a priceless service to mankind through an endless cycle of years.

The patriots, who met in a rude blacksmith shop at Washington on the Brazos to write the Declaration of Independence, while their fellow patriots held the Alamo, and those who hurled back the invaders of their homes upon the plains of San Jacinto, were not striving and fighting for the victories of a day, but to lay deep and broad in this great Southwest land the foundations of free government, equipped and ordered to survive the dangers of the frontier, famine, pestilence and war, and to last as long as men desired to live under a government of law. They were acquainted with the meaning and appearance of an invading army and knew that the answer to invasion was by meeting armed force with an armed resistance of superior strength. The scalping knife and the war cry of the Cherokee and Comanche in the forests, on the plains, and among the mountains of Texas were not legend to them. They knew that a government could not last unless there inhered in it the power to defend itself and to protect its citizens in their rights of life, liberty and

property. They knew that the defense of organized government against lawlessness required an available armed force and they were not afraid either to provide the force or its Commander-in-Chief, for they attended to both in the Constitution of the Republic of Texas.

And so, throughout the years the several Constitutions of this State have each provided that the Chief Executive should, among other things, be Commander-in-Chief of the military forces of the State, and they have enjoined upon him the responsibility of causing the laws to be executed. It was intended that this government should at all times be able to enforce its laws, continue its existence as an organized government, and have the power to accomplish both in the face of vicious lawlessness regardless of its power.

Therefore, there must be in this government—this government of Texas—somewhere a power to meet a lawless mailed fist with a mailed fist of superior strength, supported and sustained by law.

Will it be contended that this power is in the Legislative Department of the government? The Constitution does not attempt to place it there. The Legislature is the law making department, not the law executing department of the government. It has its sessions, its houses, its committees, its acts, its resolutions and its debates; and in the very nature of its organization and procedure is not pre-

pared to act promptly, in the face of extreme emergency which may arise in the form of insurrection or invasion even at a time when the Legislature is in session. This is sufficient reason why the framers of the Constitution should not, and did not, place the power to declare "martial law" and suppress insurrection in the hands of the Legislative Department of the government.

Is this power in the Judicial Department? The Constitution does not attempt to place it in this law construing and applying department of the government. Its petitions and answers, its citations and subpoenas, its decisions of law by judges and findings of facts by juries, and its appellate procedure at once suggest that the Judicial Department is not equipped to act promtly in the use of military force to suppress lawlessness in the form of insurrection.

The Constitution does provide that the Governor shall be the Chief Executive of the State; that he shall cause the laws to be faithfully executed; that he shall be the Commander-in-Chief of the military forces of the State; that he shall have power to call forth the militia to execute the laws, to suppress insurrection and repel invasions; and the statutes reaffirm these powers in the Executive Department of the government.

This is the power to proclaim "martial law" and suppress lawlessness where necessary by military force, whether in the form of insurrection, riot,

tumult or invasion, and even when it requires that life, liberty and property be taken. It is the power to compel obedience to law and act in defense of society against lawlessness.

And, when Judge Foster said in *United States vs. Wolters, supra,* that

"The Governor of Texas had complete authority to institute martial law",

it appears to appellants that he meant this necessary and inherent power of self defense that exists in the government had been reposed in the Chief Executive of the State by the Constitution and Statutes of Texas. If it is not there, apparently it exists only in the people; and, of course, to so hold would be to say that in the organization of the Government of Texas—a border state—no provision was made for the common defense.

"Martial law" like "police power" may be difficult, if not impossible of definition, especially when the attempt is made to define it in what may and may not be done under its declaration, and no attempt will be made to here define it or state its limits. At all events it is an exercise of the police power. "Martial law" may be used to repel invasion, suppress insurrection, tumult and riot, and to accomplish this end persons may be restrained of their liberty, life and property may be taken, where necessary to make effective the proclamation and to restore the orderly processes of the

government. So much is made evident from the cases above cited. If the term "martial law" arouses a prejudice or causes some to conjure the spectre of usurpation of power, then appellants say that the term may be abandoned and yet the Constitution and statutes of Texas are sufficient to repose in the Governor of the State authority to use the military forces to repel invasion, suppress insurrection and to effect that end he may under these provisions of law cause persons to be restrained of their liberty and where necessary cause life or property to be taken.

Certainly the powers exercised by the Governor of Colorado, considered in the Moyer cases, *supra*, and the powers exercised by the Governor of Montana, considered in the McDonald case, *supra*, properly belong to that military jurisdiction called "martial law," being the third kind of military jurisdiction described by Chief Justice Chase in the *Milligan case, supra.* It is not important that either the proclamations or the opinions of the courts use, or do not use, the term "martial law," the power exercised under the proclamations was a power of "martial law." If the Constitution and statutes of these states vested this authority in their respective Governors, then it seems to logically follow that like powers are vested in the Governor of Texas by similar provisions in the Constitution and statutes of this State.

The proclamation, above quoted, recites that

"Whereas, a state of insurrection, tumult, riot and breach of the peace does exist in the defined area" * * *

"Now, therefore, I, R. S. Sterling, Governor of the State of Texas," * * * *"declare that the conditions above described do exist and are clearly violative of the Constitution and laws of this State"* * * *

"And I do hereby declare martial law in said territory" * * *.

The case of *United States vs. Fischer*, 280 Fed. 208, seems sufficient authority to sustain the argument that this proclamation was effective to declare "martial law". The opinion says:

"Was the proclamation of the Governor the declaration of a state of insurrection, or were the military forces called into service merely as aides to civil officers for the purpose of assisting them in enforcing the laws? The proclamation does not use the word 'insurrection', but the condition described of lawlessness and disorder beyond the control of the civil authorities, and the declaration of martial law, are equivalent to a declaration of the existence of that organized resistance to authority known as insurrection. In re Charge to the Grand Jury, (D. C.) 62 Fed. 828; Allegheny County vs. Gibson, 90 Pa. 396, 35 Am. Rep. 670."

Point B.

When the Governor of Texas, in the exercise of his discretion, determines that a state of insurrection exists, or that there is imminent danger thereof, in a defined area and exercises the power of the office to proclaim the existence of such insurrection, or the imminent danger thereof, and calls the military forces into active service and directs such forces to suppress the declared insurrection, or imminent danger thereof, his declaration of the existence of the insurrection, or the danger thereof, is conclusive upon the courts during the period of the declared emergency and they may not on an injunction proceeding inquire into either the sufficiency of the facts to sustain the declaration or the motive of the Governor in making it. These powers are vested in the Governor exclusively by the Constitution and statutes of the State.

Quotations from decided cases form the most forceful and conclusive argument that can be brought to bear to sustain the position that the Courts will not on injunction proceeding inquire into the sufficiency of the facts to sustain the Governor's declaration that an insurrection exists or into the motive of the Governor in making the declaration.

This Court in *Moyer vs. Peabody, supra,* said:

"It is admitted, as it must be, that the Governor's declaration that a state of insurrection existed is conclusive of that fact."

In *Martin vs. Mott, supra,* this Court said:

"We are all of the opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons."

* * *

"Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts."

This Court said in *Luther vs. Borden, supra:*

"The state itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority."

In *Stewart vs. Kahn,* 78 U. S. 493, this Court said:

"The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."

In *Keely vs. Sanders*, 99 U. S. 441, it was stated:

"Further than this, whether the military authority had been established throughout Shelby County before the commissioners entered upon the discharge of their duties, is a political question, to be answered by the executive branch of the government and not by the courts. In its nature it was incapable of being determined by the latter. Successive juries might give to it different and contradictory answers."

In *Marbury vs. Madison*, 1 Cranch 137, this Court said:

"By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience." * * * "whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political."

In *Story on the Constitution*, Vol. 2, p. 110, Second Edition, 1851, it is said:

"Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, which every officer, to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militia-man, who shall refuse to obey the orders of the President?" * * *

"At a very recent period, the question came before the Supreme Court of the United States for a judicial decision; and it was then unanimously determined, that the authority to decide whether the exigency has arisen belongs exclusively to the President; and that his decision is conclusive upon all other persons."

The following expressions of the Courts are pertinent:

"Therefore it is thought that this court should not undertake to make in advance a decision of that which is solely for the determination of the President of the United States; that is to say, the necessity of using troops in a state in any given emergency." *(Consolidated Coal & Coke Co. vs. Beale et al.*, 282 Fed 934.)

"This being true, the recitals in the proclamation to the effect that a state of insurrection existed in the county of San Miguel cannot be controverted. Otherwise, the legality of the orders of the executive would not depend upon his judgment, but the judgment of another coordinate branch of the state government." *(In Re Moyer, supra.)*

"The supreme executive power of the state is vested in the governor, and by the terms of the militia article of the Constitution he has power to call forth the militia to execute the laws of the state. Article 10, Sec. 2. In this particular the language of our Constitution is in substance the same as that of the Act of 1795, conferring the same power on the President of the United States; and the effect is the same, in that it places in his hands the sole power of judging and determining, from the facts in his possession, when the exigency has arisen which makes it incumbent upon him to call forth the military power of the state." *(Chapin vs. Ferry,* 3 Wash. 386, 15 L. R. A. 116.)

"It seems to be conceded that, if the Governor has the power to declare a state of war, his action in doing so is not reviewable by the courts. Of the correctness of this view, we have no doubt. The function belongs to the executive and legislative departments of the government, and is beyond the jurisdiction and powers of the courts." *(State ex rel. Mays vs. Brown,* 71 W. Va. 519, 77 S. E. 243, 45 L. R. A. (NS) 996.)

"Whether there was justification for the declaration of a state of war in this instance is not an open question. By all authority the declaration of a state of insurgency or war by competent authority is conclusive upon the court." *(Ex parte Jones,* 71 W. Va. 567, 77 S. E. 1029, 45 L. R. A. (NS) 1030.)

"On application for writ of habeas corpus, the truth of recitals of alleged facts in a proclamation issued by the governor proclaiming a certain county to be in a state of insurrection and rebellion will not

be inquired into or reviewed." (*In re Boyle*, 6 Idaho 609, 45 L. R. A. 832.)

"It will be observed that there is no limitation, either in the Constitution or statutes, upon the power vested in the Governor to order into active service the militia of the State, or to direct into what locality they shall go or operate. He is made the sole judge of the necessity that may seem to demand the aid and assistance of the millitary forces of the state in suppressing disorder and restoring obedience to the law . . . . But to his good judgment and sound discretion the law has left the final decision as to whether the military arm of the state shall be ordered into active service. If he acts wisely and prudently, well and good. If he acts hastily and unwisely or imprudently, there is no power in the courts to control or restrain his acts. Any attempt on the part of the judicial department of the state so to do would be an interference by one department of the government with the power lodged in another department." (*Franks vs. Smith*, 142 Ky. 232, 134 S. W. 484.)

In his commentaries on the *Constitution* of the United States (Vol. 2, Sec. 1211, Second Edition, 1851), Judge Story said:

"If the power of regulating the militia, and of commanding its services in times of insurrection and invasion, are, as it has been emphatically said they are, natural incidents to the duties of superintending the common defense, and of watching over the internal peace of the confederacy, these powers must be so construed, as to the modes of their exer-

cise, as not to defeat the great end in view. If a superior officer has a right to contest the orders of the President, upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier. And any act done by any person, in furtherance of such orders, would subject him to responsibility in a civil suit, in which his defense must finally rest upon his ability to establish the facts by competent proofs. Besides; in many instances the evidence, upon which the President might decide that there was imminent danger of invasion, might be of a nature not constituting strict technical proof; or the disclosure of the evidence might reveal important state secrets, which the public interest, and even safety, might imperiously demand to be kept in concealment. The act of 1795 was manifestly framed upon this reasoning. The President is by it necessarily constituted, in the first instance, the judge of the existence of the exigency, and is bound to act according to his belief of the facts. If he does so act, and decides to call out the militia, his orders for this purpose are in strict conformity to the law; and it would seem to follow, as a necessary consequence, that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect; and it cannot be that it is a correct inference, that any other person has a right to disobey them. No provision is made for an appeal from, or review of the President's opinion. And whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, the

general rule of construction is, that he is thereby constituted the sole and exclusive judge of the existence of those facts."

In *Luther vs. Borden, supra,* Judge Taney said:

"After the President has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government, which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order."

Article II, Sec. 1, of the *Constitution of Texas* provides:

"The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, * * * and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

Article IV, Sec. 7 of the *Constitution of Texas* has reposed in the Governor the power to call forth the militia to execute the laws and to suppress insurrections and repel invasions. To argue that the courts have the power to enquire into the sufficiency of the facts to sustain the Governor in the exercise of his discretion to call out the military forces is to argue out of the Constitution the provision separating the powers of government into departments. And, this applies as well to a review by the courts of the United States of the Governor's exercise of his discretion as to a review by the courts of Texas, for the guarantee in the Constitution of the United States (Art. IV, Sec. 4, Clause 1) of republican form of government to every state imposes a duty upon the Congress and the President and not upon the judiciary.

If the exercise of discretion by the Governor in calling out the militia were subject to judicial review in the face of emergencies, it would render invalid and useless the power given to him by the Constitution of the State to preserve and protect the life of the government from destruction by insurrection and revolt.

POINT C

When the Governor of Texas issues his proclamation declaring a state of insurrection, riot, tumult and breach of the peace, or imminent danger there-

of, to exist in a defined area and as Commander-in-Chief of the military forces of the State calls them into active service to suppress such conditions, he may make the ordinary use of the soldiers and direct them to do whatever appears to him to be reasonably necessary at the time to suppress the insurrection and restore the peace; and the courts may not, during the period of the declared emergency, by writ of injunction, control the details of the Governor's exercise of this power of government or the details of his use of the soldiers; under such circumstances the courts cannot by injunction substitute their judgment and discretion for that of the Governor in determining the means to be employed in suppressing or averting the existing or impending riot and insurrection.

Any argument that the courts can by injunction control the manner in which the Executive uses military forces under a declaration of "martial law" must be based upon a contention that the use violates the due process clause of the Constitution. "Martial law" is an exercise of the police power (the necessity for its exercise being here an executive prerogative) and it has been held that the due process clause of the Fourteenth Amendment to the Constitution of the United States was not designed to interfere with the power of the State to protect the lives, liberties and properties of its citizens. This rule may be subject to modification as to the equal pro-

tection clause, but there seems to be ample authority to sustain the position stated. *Barbier vs. Connolly*, 113 U. S. 27; *Pacific Gas & Electric Company vs. Police*, 251 U. S. 22; *Compagnie vs. Louisiana*, 186 U. S. 380. This principle should answer any assertion that resort may be had to injunctive process to control the manner and details of the use of troops, where their use has been found necessary by the executive in order to protect life, liberty and property. The discretion to determine what is necessary to make the proclamation effective being vested in the executive, appellants will hereinafter show that, when he finds a taking of property is necessary, the taking is with due process.

There is, however, other argument against the power of the courts to issue injunctions for this purpose.

The Constitution separates the powers of government into three departments. The Executive is charged with the enforcement of the law, and to perform this duty the Chief Executive is given the power to employ the use of the military forces of the State. Any attempt upon the part of the courts to control the manner in which he uses the military forces in the face of an emergency brought about by insurrection would be a clear invasion by one department of fields properly belonging to the other coordinate department.

In *Franks vs. Smith*, 142 Ky. 232, 134 S. W. 484, it was said:

"But to his good judgment and sound discretion the law has left the final decision as to whether the military arm of the state shall be ordered into active service. If he acts wisely and prudently, well and good. If he acts hastily or unwisely or imprudently, there is no power in the courts to control or restrain his acts. Any attempt on the part of the judicial department of the state so to do would be an interference by one department of the government with the power lodged in another department."

If the courts can attempt, during the emergency, to restrain a certain use of the soldiers which the Executive has found is necessary in order to make effective his proclamation, then it would be logical to say that the courts might nullify the whole movement by enjoining in the beginning the issuance, or threatened issuance, of a proclamation declaring an insurrection to exist and ordering soldiers to suppress it, upon the ground that it did not appear to the court that the nature of the insurrection was sufficient to justify the action. Appellants believe that ample authority has been cited to demonstrate that this power is not vested in the courts.

In *Martin vs. Mott, supra*, it was said:

"The law contemplates that, under such circumstances, orders shall be given to carry the power

into effect; and it cannot therefore be a correct inference that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts."

It was said in *Stewart vs. Kahn*, 78 U. S. 493, that

"The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."

In the case of *Burnquist vs. Minnesota*, 168 N. W. 634, 3 A. L. R. 1476, the Supreme Court of Minnesota said:

"The authorities seem to agree that under Constitutions similar to that of this state, where all power and authority of government is vested in three distinct, co-ordinate, and independent departments,—the legislative, the executive, and the judicial,—the judicial has not the power to control, coerce, or restrain the action of the other two within the sphere allotted them by the Constitution wherein to exercise judgment and discretion. It would be unthink-

able that the courts of this state should attempt to enjoin the legislature from enacting or the governor from approving a statute, no matter how glaringly unconstitutional it might appear or how highly injurious its mere enactment might be to private interests."

Neither the Legislative Department nor the Judicial Department can dictate to the President, as Commander-in-Chief, the manner in which he shall conduct a war, its campaigns, its retreats, its advances, or its battles; but if he persists in a stubborn prosecution of plans which have proven unsuccessful and are bringing defeat and disgrace to the nation, the Congress may impeach him, but the courts would be without power to enjoin him or direct a plan or policy of war to him. *Pomeroy's Constitutional Law*, p. 483, (Ed. 1870).

In *United States vs. Fischer, supra*, it was said:

"When a state of war or insurrection exists, and the Governor has legally called into action the military forces of the state, the will of the commander becomes the controlling authority in the occupied territory, so far as he chooses to exert it, subject to the laws and usages of war. New Orleans vs. Steamship Co., 20 Wall. 387, 22 L. Ed. 354; United States vs. Diekelman, 92 U. S. 520, 23 L. Ed. 742; Luther vs. Borden et al, 7 How. 1, 12 L. Ed. 581; United States vs. McDonald (D. C.), 265 Fed. 754; In re Egan, 5 Blatchf. 319, Fed. Cas. No. 4,303;

Commonwealth vs. Shortall, 206 Pa. 165, 55 Atl. 952, 65 L. R. A. 193, 98 Am. St. Rep. 759; 40 Cyc. 383, 390."

Appellants believe that it has been conclusively shown that the courts are without authority to review the sufficiency of the facts to support the finding of the Governor that a state of insurrection exists and that the use of the military forces is essential to suppress it. Let it be assumed that soldiers are in the field under a declaration of "martial law" with orders to suppress the insurrection and restore order. A situation arises which the commanding officer believes so grave that he can only meet it by issuing orders to his men to shoot. The chances are that someone is going to lose his life. If the courts do not have the power to review the sufficiency of the facts upon which the Governor acted and exercised his discretion in the first instance, it cannot be logically contended that the courts have the power to restrain the order "commence firing" until the facts upon which the commanding officer and his subordinates issued the order have been subjected to judicial review, and until the courts have had opportunity to substitute their judgment for that of the military officers.

If the executive is vested with the discretion to determine the exigency requiring the declaration of "martial law", it logically follows that the executive together with the officers in charge of his mili-

tary forces are to determine the use of soldiers that is necessary to make the proclamation effective.

If the military forces in the field under declaration of "martial law" are faced by the armed forces of insurrection and the officer in command orders his men to fire, is the Chancellor going to stand by and issue a temporary restraining order or interlocutory injunction to restrain the men from placing their forefingers upon the triggers of their rifles until in the quiet of judicial proceeding the pleadings can be heard, facts reviewed and a solemn judgment arrived at and entered as to the necessity for the command?

It is a clear and unmistakable fact, concerning which there can be no debate, that the judiciary is not equipped to determine the strategy or tactics of military campaigns and is not in position to function with that rapidity essential to the conduct of a war, whether it be a foreign war or domestic insurrection. This field of governmental activity has been wisely left entirely to another department of the government. It is as logical to argue that the courts can force a declaration of "martial law" (in the absence of constitutional provisions prohibiting mandamus against the executive) as it is to argue that they can restrain its declaration. And, furthermore, it is just as logical to argue that the courts can issue orders to the soldiers to proceed along certain lines in suppressing insurrection, as it is to

argue that they can issue injunctions restraining them from proceeding along some other line. The decisions of these questions were from necessity left to another department of the government. There may be a responsibility after the emergency has past for a wrongful decision and an unlawful order and a consequent invasion of a private right, but certainly the courts cannot, during the existing of the emergency, assume to control the campaign conducted against the insurrection or riot, without assuming powers belonging to another department of government. *(Hartranft's Appeal*, 85 Penn. St. 433, 27 Am. Rep. 667.)

If the executive be a tyrant or despot in the use of this power which the Constitution vests in him, he is, as suggested in some of the cases, subject to impeachment; and, so he is not above the law or the courts, for the court of impeachment is a part of the judicial system. If his use of the power becomes despotic to the extent that he has destroyed a republican form of government, there is provision in the Constitution and laws of the United States whereby the United States Government may restore a republican form of government to any state.

In *Moyer vs. Peabody, supra*, Justice Holmes said:

"That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist, and, of course, that he may use the

milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace." * * *

"No doubt there are cases where the expert on the spot may be called upon to justify his conduct later in court, notwithstanding the fact that he had sole command at the time and acted to the best of his knowledge. That is the position of the captain of a ship. But, even in that case, great weight is given to his determination, and the matter is to be judged on the facts as they appeared then, and not merely in the light of the event."

It is said in *In re Boyle, supra*, that

"The statutes of this state make it the duty of the Governor whenever such a state or condition exists" * * * "to proclaim such locality in a state of insurrection" * * *. "It would be an absurdity to say that the action of the executive under such circumstances may be negatived and set at naught by the judiciary, or that the action of the executive may be interfered with or impended by the ju-juriciary."

The Supreme Court of Pennsylvania in *Wadsworth vs. Shortall*, 206 Pa. St. 165, 55 Atl. 952, 98 A. S. R. 759, said:

"The effect of martial law, therefore, is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security

of life and property are concerned, there is no limit but the necessities and exigency of the situation. And in this respect there is no difference between a public war and domestic insurrection."

Again, in *United States vs. Fischer, supra,* it is said:

"In cases of military occupancy during war or insurrection, the passing of the military lines by persons without permission, the possession of arms and ammunition, the sale of intoxicating liquors, may cause the commander the loss of a battle, and yet these acts may not offend against the local laws. The usage in time of war has been to make regulations covering offenses in violation of the laws of war or of military discipline. Winthrop on Mil. Law (2d Ed) 1310, 1311."

In *Franks vs. Smith, supra,* the court said:

"For his conduct in ordering out and *controlling the movements and operations of the state militia,* the governor is answerable only at the bar of public opinion, unless it be that abuses might warrant impeachment proceedings." *(Italics ours.)*

In *Mayes vs. Brown,* 71 W. Va. 519, 77 S. E. 243, 45 L. R. A. (N. S.) 996, it is said:

"It seems to be conceded that, if the governor has the power to declare a state of war, his action in

doing so is not reviewable by the courts. Of the correctness of this view, we have no doubt. The function belongs to the executive and legislative departments of the government and is beyond the jurisdiction and powers of the courts. There is room for speculation, of course, as to the consequences of an arbitrary exercise of this high sovereign power"; * * *. "The sovereign power rests in the people and may be exerted through the Legislature to the extent of impeachment and removal from office of a governor for acts of usurpation and other abuses of power."

If the proclamation of the executive is final evidence of the existence of the insurrection (and appelants believe that has been demonstrated from the authorities), then the executive, as the officer charged with the duty of enforcing the law and suppressing the insurrection, must have the authority to make his proclamation effective. The courts have said that he may make the ordinary use of troops. The expression certainly implies that he may use his troops to go to the fountain head of the insurrection and suppress the insurrection by removing its cause. If in the exercise of his discretion the Governor determined that a suppression of the sale of fire arms would be effective to end the insurrection, it cannot be doubted, though the Constitution of Texas gives to every citizen the right to keep and bear arms in the lawful defense of himself and the state, that he could prohibit the sale of fire arms in the disaffected

area and make his order effective through the use of soldiers; if in the exercise of his discretion the Governor determined that the sale of intoxicating liquors, even though permitted by law, was the impediment in the way of restoring peace, he would have power to issue orders prohibiting its sale and make the order effective through the use of troops; if the mining of coal, or the refusal to mine it, was so determined to be the cause of trouble, the executive would have the power to order that the mines be operated or closed as in his judgment might be most effective to suppress the insurrection, and, having determined which course would be most efficacious to restore peace, he would have authority to make his orders effective by the use of military forces; and, if the executive determined, as in this case, that the cause of the trouble was the operation of oil wells, he would have power to end the insurrection by removing its cause through controlling the operation of the wells as in his judgment the situation might require. These acts upon the part of the executive would be nothing more or less than the exercise of a power which the law gives him to make effective his proclamation and restore peace and order. And, the courts could not, without invading the field of another department of the government, attempt to control by injunction this exercise of discretion.

If the sovereign people have seen fit in the Constitution to entrust the executive Department with

the discretion to determine the necessity and extent to which soldiers shall be used in "martial law", the courts cannot under the disguise of restraining an abuse of discretion actually presume to substitute their own discretion for that of an equally great department of government, without at the same time annihilating the line of division between the departments of government. As is said in *Hartranft's Appeal, supra:*

"What, then, are the duties, powers and privileges of the governor? In the language of the Constitution, Art. 4, Sec. 2, 'The supreme executive power shall be vested in the governor, who shall take care that the laws be faithfully executed.' Also, same article, Sec. 7, 'The governor shall be commander-in-chief of the army and navy of the Commonwealth, and of the militia, except when they shall be called into the actual service of the United States.' He is, also, invested with the appointing and pardoning powers; the power to convene the legislature in cases of emergency and to approve, or veto, bills submitted to him by the general assembly. It is scarcely conceivable that a man could be more completely invested with the supreme power and dignity of a free people. Observe, *the supreme executive power* is vested in the governor and *he is charged with the faithful execution of the laws*, and for the accomplishment of this purpose he is made Commander-in-Chief of the army, navy and militia of the State. Who then shall assume the power of the people and call this magistrate to an

account for that which he has done in discharge of his constitutional duties?" * * * "And if the courts can compel him to answer, why can they not compel him to act? All these things, we know, may be done in the case of private individuals; such an one may be compelled to answer, to account and to act. In other words, if from such analogy we once begin to shift the supreme executive power from him upon whom the Constitution has conferred it, to the judiciary, we may as well do the work thoroughly and constitute the courts the absolute guardians and directors of all governmental functions whatever. If, however, this cannot be done, we had better not take the first step in that direction. We had better at the outstart recognize the fact, that the executive department is a co-ordinate branch of the government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere, than has the executive, under like conditions, to interfere with the courts."

POINT D

The State, acting through the Governor, may take private property located in the area in which insurrection, riot, tumult and breach of the peace, or imminent danger thereof, have been declared by proclamation to exist. The decision of the Governor that the taking of private property is necessary

to prevent the impending insurrection, riot, tumult and breach of the peace, or to suppress the existing insurrection, riot, tumult and breach of the peace, is conclusive, and a taking under such circumstances is with due process of law.

The power granted to the Governor while generally referred to as the power to declare and enforce "martial law" is actually the power to suppress and head off insurrection. Necessarily impied therein is the power to determine when insurrection exists or impends and the power to perform those acts which he deems necessary to suppress or head off the insurrection which exists or impends. This emphatically does not mean that he has power to violate a single provision of the constitution of the state or nation. It does not, for example, mean that he has the right to suspend the writ of habeas corpus. He has not that right. It does mean that his decision that property must be taken and his taking of that property constitute due provess of law.

Now, why does the power of the Governor to suppress and head off insurrection give to him the power to take private property when necessary to that end? Because of the sound and familiar legal principle that power to do a thing necessarily implies power to do all things necessary to do the principal thing. The only proposition which would authorize a decision that the right to take private property is not necessarily implied in the power to

suppress and head off insurrection is that taking private property cannot be necessary. This contention cannot stand. The contrary is clear. It may be necessary to take food to feed troops. It may be necessary to take weapons to combat the enemy. It may be necessary to destroy crops lest the enemy feed upon them, and homes lest the enemy shelter in them. It may be necessary to take arms and munitions of war lest the enemy employ them against the government. It may be necessary to prohibit a man from selling shotguns—a lawful business—lest some other man do an unlawful thing, i. e., murder a soldier with a shotgun.

It may well be supposed that the court recognizes that private property may be taken when necessary in suppressing or heading off insurrection, but in order to remove all doubt appellants quote the Supreme Court of the United States to that effect. In *Mitchell vs. Harmony*, 13 Howard 115, Chief Justice Taney said:

"There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner" * * *.

In the case of *United States vs. Russell*, 13 Wallace 623, the Supreme Court spoke as follows through Justice Clifford:

"Private property, the Constitution provides, shall not be taken for public use without just compensation, and it is clear that there are few safeguards ordained in the fundamental law against oppression and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation, except in certain extreme cases, is a condition precedent annexed to the right of the government to deprive the owner of his property without his consent. 2 Kent, Com., 11th ed. 339; 2 Story, Const. 3rd ed. 596. Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized or appropriated to the public use, or may even be destroyed without the consent of the owner. Unquestionably, such extreme cases may arise, as where the property taken is imperatively necessary in time of war to construct defenses for the preservation of a military post at the moment of an impending attack by the enemy, or for food or medicine for a sick and famishing army utterly destitute and without other means of such supplies, or to transport troops, munitions of war, or clothing to reinforce or supply an army in a distant field, where the necessity for such reinforcement or supplies is extreme and imperative, to enable those in command of the post to

maintain their position or to repel an impending attack, provided it appears that other means of transportation could not be obtained and that the transports impressed for the purpose where imperatively required for such immediate use. Where such an extraordinary and unforeseen emergency occurs in the public service in time of war no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent of the immediate public exigency, but the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative and such as will not admit of delay or a resort to any other source of supply; and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property so impressed, appropriated, or destroyed. Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown, the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner."

So, regardless of considerable speculation to the contrary, this has been recognized by the Supreme Court as the law of the land for almost a century.

The power to take private property, when nec-

essary, of course, implies authority to determine when the taking is necessary.

The power then is discretionary, and to be executed by the Governor upon his own opinion of a certain fact, that fact being the necessity for the taking.

The rule was stated by Justice Story in *Martin vs. Mott, supra,* to be as follows:

"Whenever a statute gives a discretionary power to any person, to be executed by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts."

With all deference, appellants submit that this statement of the law is conclusive in this case. The sole and exclusive judge of the necessity of taking appellees' property has decided that the necessity exists, and this taking is in the eyes of the law a taking necessary to suppress and prevent insurrection, riot, tumult and breach of the peace, and is accordingly due process of law.

While due process of law in taking property may not be due process in taking life or liberty, it is certainly true that due process in taking life or liberty suffices as due process to take property.

Under the law, the pleadings and the evidence, the act is one which in so far as the court goes is necessary to be performed by the Chief Executive of a

sovereign State in order to suppress and prevent riot, tumult, insurrection, and breach of the peace wholly within that State. Has it ever been said, will it ever be said, can it ever be said, by any court, anywhere, at any time, that an act necessarily performed by the Governor of a State, in putting down and preventing that which is in its very nature a violation of a law endangering the very life of the State, is not "due process of law"? Appellants affirm that it has not been said by any court, cannot be said by any court, and will not be said by this court.

The statement just made is founded upon the decisions of the courts of this country, State and Federal. In the case of *Luther vs. Borden, supra*, Chief Justice Taney said:

"The State itself must determine what degree of force the crisis demands."

The detention of men without hearing, without indictment, without charges filed, without bail, is assuredly under ordinary circumstances not "due process of law"; but the courts have repeatedly held that a Governor and his subordinates, when they consider it necessary in suppressing and preventing insurrection, may detain and imprison a citizen without any of these; and that under such circum-

stances—which are the circumstances here—the detention was due process of law. It is the application of the old undoubted rule; what is not due process of law under one set of facts becomes due process of law under another set of facts. There is nothing more sacred in the right of property than in the right of personal liberty.

In *Re Moyer, supra*, the Supreme Court of Colorado said that such arrest and detention violated no constitutional right of Moyer, and specifically stated that he was not held "without due process of law".

As a result of this imprisonment, Moyer, after the determination of "martial law", sued the Governor of Colorado for damages. The Supreme Court of the United States in *Moyer vs. Peabody, supra*, speaking through Justice Holmes, said:

"Or course, the plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances. It varies with the subject matter and the necessities of the situation. Thus, summary proceedings suffice for taxes; and executive decisions for exclusion from the country. Den Ex Dem. Murray v. Hoboken Land & Improv. Co., 18 How. 272, 15 L. ed, 372; United States v. Ju Toy, 198 U. S. 253, 263, 49 L. ed. 1040, 1044, 25 Sup. Ct. Rep. 644." * * * "When it comes to a decision by the head of a State upon a matter involving its life, the ordinary rights of individuals

must yield to what he deems the necessities of the moment. Public danger warrants the sustitution of executive process for judicial process."

In *Moyer vs. Peabody*, 148 Fed. 870, 876, it was said:

"Measures are sometimes necessary under the police power, that are severe, such as the summary destruction of property used for an unlawful purpose (Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. ed. 385); such as treating property used in an unlawful traffic as a nuisance (Mungler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. ed. 205; Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. ed. 346); such as the summary destruction of property to stay conflagration (Bowditch v. Boston, 101 U. S. 16, 25 L. ed. 980); such as the summary destruction of obscene books and diseased cattle (Sentell v. Railroad Co., 166 U. S. 698, 17 Sup. Ct. 693, 41 L. ed. 1169); such as the restraint of personal liberty in passing either into or out of an infected district, for the extermination of contagion (Compagnie Francaise, etc., v. Board, 186 U. S. 380, 22 Sup. Ct. 811, 46 L. ed. 1209), and the prohibitions found in the Fourteenth Amendment have never been construed to be an encroachment upon the exercise of the miltiary power within the lines here indicated —invoked to protect the very life of the social body. In both case we find their right and justification in the maxim, "Salus populi, suprema lex."

In the cases of *United States vs. Wolters, supra*, and *United States vs. Fischer, supra*, the Federal

Courts denied writs of habeas corpus, sought to release from custody men sentenced to prison by military commissions. In the last paragraph of the Fischer case, Judge Munger says:

"The conclusion is that assuming the acts of the Military Court to have been done in accordance with the laws of the State, there is nothing in the exertion of this power which contravenes the right of due process of law guaranteed by the Constitution of the United States."

To the same effect are the decisions in *State vs. Brown, supra,* and *Re Boyle, supra,* by the Supreme Courts of West Virginia and Idaho, respectively. *Franks vs. Smith, supra,* was a decision in a damage suit by the Court of Appeals of Kentucky, wherein the same decision was reached.

Appellees may specifically object that because this property is taken without a hearing, it is taken without due process. The contention will not stand up. As said by Justice Holmes in *Moyer vs. Peabody, supra:*

"Summary proceedings suffice for taxes, and Executive decisions for exclusion from the country."

The taking of property in a territory, where insurrection and imminent danger of insurrection exist, in order to suppress and head off insurrection, is not a taking where a hearing is essential to due process.

Here it would be possible to cite many cases where under the law of eminent domain property has been held to be taken in violation of due process, because no provision was made in advance for compensation. These cases, of course, are not applicable to a situation where property is taken in order to suppress or prevent insurrection.

Ordinary eminent domain cases are not cases which come to a decision by the head of the State upon a matter involving its life, when the ordinary right of individuals must yield to what the head of the State deems the necessities of the moment, and where public danger warrants the substitution of executive process for judicial process. It is the law that such a taking by the executive is an implied promise upon his part that the State will make proper compensation, and that the State is morally bound at some later date to pay to the private individual the reasonable value of his property taken during the emergency.

This is shown by the language quoted above from *Mitchell vs. Harmony, supra*, and the following from the case of *United States vs. Russell, supra:*

"Such a taking of private property by the government when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property

is imperative and immediate, and the danger, as heretofore described, is impending, and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice."

Thus it appears that this taking is not forbidden as "without compensation".

It will not do for appellees to allege that these cases where property is actually taken, as where food is taken and consumed by the troops, do not apply to cases such as this where they are merely prohibited from carrying on a lawful business. If this distinction be sound, it amounts to the fact that their property is not "taken" at all with or without due process, and since their property is not taken, they are entitled neither to an injunction nor to compensation.

Some of the language in the decisions of *Mitchell vs. Harmony, supra,* and *United States vs. Russell, supra,* appears upon casual reading to militate against the proposition that the Governor is the sole and exclusive judge as to whether or not it is necessary to take appellees' property. That this is not true, however, becomes readily apparent upon analytical examination.

Mitchell vs. Harmony, supra, was a case wherein

an army officer was sued in trespass for having appropriated the goods of a trader, by keeping the goods in his possession over the trader's protest, and then losing the goods. The case holds only that in an action for damages the person appropriating private property can only escape liability in damages by proving the necessity of taking. In other words, the wisdom of the law says the nature of the act is such that its restraint will not be countenanced, but its performer may be held liable for doing it. While it is apparently illogical to hold a man liable in damages for performing an act which equity will not restrain, it is a situation created by the frequently illogical and unjust theory of expediency. And the rule unquestionably is one having a salutary effect. Substantially it acts as a brake upon the action of the officer. *Mitchell vs. Harmony, supra,* and *United States vs. Russell, supra,* (which latter case adds nothing to the former), while certainly authority that a jury verdict in this case holding the appellants liable in damages will not be disturbed upon appeal, are just as certainly not authority for the argument that appellants' act should be restrained by a court of equity.

If the Governor found that it was necessary to control the production from appellees' oil wells in order to make effective his proclamation, the Constitution having vested him with discretion in finding the means of making his proclamation effective,

this finding and the subsequent control of the appellees' oil wells were all with due process of law. *Clearing House vs. Coyne*, 194 U. S. 497; *Weimer vs. Bunbury*, 30 Mich. 201.

Whether or not the Governor made the finding is to be determined from the record in this case and appellants submit that when his proclamation and the record are consulted that there is no question but that he did conclude that the control of appellees' wells, along with the other wells in the field, was not only necessary, but the only effective way to end the existing or avert the threatened insurrection. To another the contrary might have appeared, but it was to the Governor of Texas that the Constitution had confided these powers, and it was the then Governor of Texas that the people had elected to exercise these powers and exercise this discretion. When he made his finding and determined the necessity of his action that met fully the requirement of due process of law.

When in adopting the Constitution of Texas (Art. IV, Sec. 7) the people ordained that the Governor should be Commander-in-Chief of the military forces of the State and that he should "have power to call forth the militia to" * * * "protect the frontier from hostile incursions by Indians and other predatory bands", though they may not have actually had in mind another provision of the Constitution of Texas (Art. I, Sec. 19) providing that "no citizen

of this State shall be deprived of life, liberty, property, privileges or immunities or in any manner disfranchised, except by due course of the law of the land", it is clear that from the standpoint of judicial construction no other conclusion could be reached than that the finding of the executive of the necessity for use of military forces "to repel hostile incursions by Indians or other predatory bands" and his finding that the taking of life and property was necessary to the protection of the frontier, amount to a substitution of executive process for judicial process and constitute, under such circumstances, "the due course of the law of the land". This is an illustration that what is not due process of law under one set of circumstances may be due process of law under another set of circumstances. If the Governor of Texas,—a frontier state—found it necessary to call out the military forces to repel marauding bands along the one thousand mile southern and western border of this State and to protect life and property from such bands, there can be no question but that his finding of the existing necessity for the use of military force would be final upon the courts. If in the prosecution of his duties in this respect, he found it necessary to quarter soldiers on a Texas ranch, and for that purpose and to that extent to take the property of a citizen; or, if he found it necessary for the purpose of discharging his duty to take mounts from a ranch for the use of his sol-

diers; or, if he found it necessary to direct his soldiers "to shoot and shoot to kill", there can be no question but that such taking of property and life would fully meet every requirement of due process of law and of due course of the law of the land. It is difficult to imagine the processes of the Court restraining the Governor from doing the above enumerated things under such circumstances until judicial inquiry could pass upon the existing necessity.

So, in this case when the Governor found as a fact that it was necessary to control the production of appellees' wells in order to suppress the existing or avert the impending insurrection, his finding of the necessity constituted due process of law.

It is not important, let us repeat, whether the facts existing would appear to another as sufficient to justify the finding; it is only important that the finding was made by the Governor of Texas; and if it was made, the requirement of due process of law was fully met.

That a finding of necessity was made is important, but that facts existed to sustain the finding, which might appear different to men of differing judgment and varying courage, is neither essential nor important; and the Courts are without jurisdiction to inquire into the sufficiency of the facts. The various proclamations and orders issued by the Governor and his testimony upon the trial are the evi-

dence, that the finding was made, and show that a finding of necessity was made.

The Governor's motives in making the findings are questions that become unimportant because it was the case of an officer vested with a discretion finding the necessities, and exercising his discretion.

The Courts could not weigh the sufficiency of the facts to sustain his finding, or say that the necessity did not reasonable appear, without substituting their discretion for that of the Governor's and thereby cross the line of division between the judicial and executive departments of the government. As was said in *Mississippi vs. Johnson*, 4 Wall. 475:

"Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed" * * *. "The duty thus imposed upon the President is in no just sense ministerial. It is purely executive and political.

"An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized in the language of Chief Justice Marshall as 'an absurd and excessive extravance'."

And, "The Congress is the legislative department of the government, the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

"The propriety of such interference will be clearly seen upon consideration of its political consequences.

"Suppose the bill filed and the injunction prayed for are allowed. If the President refuses obedience, it is needless to observe that the Court is without power to enforce its process. If, on the other hand, the President complies with the order of the Court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and the legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this Court interfere in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a Court of Impeachment? Would the strange spectacle be offered to the public wonder of an attempt by this court to arrest proceedings in that court?

"These questions answer themselves."

The expression of the Court in *Louisiana vs. McAdoo*, 234 U. S. 627, further enforces the position that the courts will not in cases like this interfere with the Governor's exercise of discretion or attempt to substitute their discretion and judgment for that of the executive. It is said:

"There is a class of cases which holds that if a public officer be required by law to do a particular thing, not involving the exercise of either judgment or discretion, he may be required to do that thing upon the application of one having a distinct interest in the doing of the act. Such an act would be

ministerial only. But if the matter in respect to which the action of the official is sought is one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official entrusted by law with its execution. Interference in such cases would be to interfere with the ordinary functions of government."

Appellants urge that the Courts can not lawfully inquire into the sufficiency of the facts, or substitute their judgment in cases like this for the judgment of the Executive on the issue as to whether or not the facts justify the conclusion reached by the Executive that it is necessary to take property; and that the Courts cannot lawfully substitute their discretion for that of the Governor, in such cases as to how the property shall be taken or the amount or extent of the taking. They may call upon him later, after the emergency has past, to account for the things that he has done,—we are not considering that question or attempting to express a view upon it—but while the emergency lasts the Courts cannot properly, and, therefore, should not, place themselves above the executive department by interposing their judgment and discretion where the law has made it the duty of the executive to use his judgment and discretion.

THEORY THAT UNDER DECLARATION OF MARTIAL LAW THE SOLDIERS ARE CALLED OUT TO ACT AS CIVIL OFFICERS WITH NO GREATER POWER THAN CIVIL OFFICERS IS ERRONEOUS.

A holding that under a declaration of "martial law" the troops are called out to act as civil officers with no greater power than the latter would amount, under certain circumstances, to a complete destruction of the power given an executive to use soldiers to suppress insurrection and cause the law to be executed.

While it is true as pointed out in *In re Moyer, supra*, that,

"The Governor, in employing the militia to suppress an insurrectiton, is merely acting in his capacity as chief civil magistrate of the State and although exercising his authority—conferred by the law through the aid of the military under his command, he is but acting in a civil capacity";

nevertheless, the power which exists in the Governor under such circumstances, and through him in the military forces which he employs, is different from that of ordinary civil officers because of the very necessities of the occasion. In instances of industrial trouble, where it has been found necessary to use the military forces, the need arises, it may be argued, not from inability of the local civil officers to control the situation, but from indifference or unwillingness

upon their part to use their ultimate power to enforce the law and preserve the peace. Instances can be imagined in which the local civil officers are in sympathy with the insurrectionary movement and in which one of the first necessary duties of the military forces would be to temporarily suspend or remove the local civil officers, in order to gain the ultimate object. The case of *United States vs. Wolters, supra*, furnishes an illustration of an instance in which the military authorities determined the need of suspending civil officers. The case of *In re Louis Crim*, District Court of the Eighty-fourth Judicial District of Texas, Hutchinson County (unreported), when the military forces were used in Borger, Texas, in 1929, after the assassination of the District Attorney, furnishes another instance in which the suspension of the local officers was deemed to be necessary in order to accomplish the purpose of ending lawlessness and restoring the peace. Illustrations can be given without overtaxing the imagination in which the local civil officers would be the real insurrectionary force, and to say that the Governor's military forces are merely to act with no more power than local civil officers would render such forces useful for nothing except parades.

EX PARTE MILLIGAN.

It is proper in this brief to discuss the case of *Ex Parte Milligan, supra*, and its applicability to this

case. There were three questions considered in that case:

(1) On the facts stated in said petition and exhibits, ought a writ of habeas corpus to be issued?

(2) On the facts stated in said petition and exhibits ought Lambdin P. Milligan to be discharged from custody as in said petition prayed?

(3) Whether upon the facts stated in said petition and exhibits, the military commission mentioned therein had jurisdiction legally to try and sentence Milligan in the manner and form as in said petition and exhibits is stated.

The Court answered the first and second questions in the affirmative and the third in the negative. The case then holds, and holds only, that under the particular facts of the case the military commission lacked jurisdiction to try Milligan and sentence him to death, and that the writ of habeas corpus should issue at his instance and he be discharged. Barring certain procedural points, there were no other questions before the Court.

The controlling fact in the Milligan case, the pivotal point upon which the opinion turned, was this—in the geographical entity wherein the military commission functioned and claimed jurisdiction, there existed no state of affairs authorizing it to function as it did and conferring upon it jurisdiction to try Lambdin Milligan and sentence him to death.

This is clear from the most causal consideration of the questions; for if the Court answers the third question in the negative, i. e., holds that the Commission had no jurisdiction, the affirmative answers to questions 1 and 2 follow without argument.

Consider the opinion of the majority. Having laboriously and lengthily argued the question of jurisdiction, and decided it in the negative, the Court briefly states the logical sequence, "the two remaining questions in this case must be answered in the affirmative".

Turn to the arguments of Milligan's counsel. The first question discussed by David Dudley Field is "Was the military commission a competent tribunal for the trial of petitioners upon which they were convicted and sentenced?" Jeremiah Black stated to the Court: "The case before you presents but a single point and that an exceedingly plain one", and then says, "Keeping the character of the charges in mind, let us come at once to the simple question upon which the Court below divided in opinion: 'Had the commissioners jurisdiction—were they invested with legal authority to try the relators and put them to death for the offense of which they were accused' ". And Garfield sums it up: he says, "Had the military commission jurisdiction legally to try and sentence the petitioners: Upon the determination of this question the whole cause rests".

The Court was unanimous upon the answers to

the certified questions. Unanimously they held that no authority had invested the military commission with jurisdiction, and any holding beyond this is obviously dicta. The facts in the Milligan case limit the scope of its opinion to cases where the military authority asserts jurisdiction in a peaceful locality where no person, pursuant to constitutional and statutory authority, has proclaimed a state of riot, or insurrection, to exist or impend. Five members of the Court, it is true, went beyond the proper bounds which were limited to "the facts stated in said petition and exhibits. In the broadest terms they stated that "Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction". They stated that martial rule could not exist where the courts were open and unobstructed in the exercise of their jurisdiction. It was evidently this expression that the Chief Justice and three of the Associate Justices had in mind when they stated,

"We are unwilling to give our assent by silence to expressions of opinion which seem to us calculated, though not intended, to cripple the constitutional power of the government and to augment the public dangers in time of invasion and rebellion."

The Chief Justice and those who concurred with him in the views expressed in the dissenting opinion,

all concurred in the actual decision reached in the majority opinion, but they did not consent to certain of the statements in the majority opinion.

The difference between the Milligan case and the case at bar rests in the fact that in the case at bar a competent authority had declared a defined area to be in a state of insurrection and by proclamation had instituted "martial law".

In the case of *United States vs. Adams*, 26 Fed. (2d) 141, (cited by the trial court), it is stated:

"The order was not attested by or filed with the Secretary of State, as state papers are, nor issued as a proclamation. It was issued direct to the Adjutant General.

"It is agreed that no attempt was made to declare martial law" * * *. "It is immaterial, however, because the State's counsel with commendable frankness toward the Court admit that martial law has not been declared and does not exist in these two counties."

That case is distinguished from the case at bar by the difference in the nature of the executive orders involved in the two cases.

In *Ex Parte Lavinder*, 108 S. E. 428, no military force was placed in command of the affected area,

but the Adjutant General was present undertaking to direct the civil authorities. The Court correctly distinguishes between the status of such an operation and one in which, as in the instant case, there is actual occupancy of the territory by military forces.

The positions taken in this argument do not place the Governor of the State above the Courts or superior to the Constitution and laws. The Executive Department is placed upon an equal plane with the Courts. The Governor remains subject to the Constitution and statutes and must respect and obey each. He is subject to prosecution in the criminal courts for violation of the criminal laws; he is subject to suit for damages after the emergency has past for any unlawful invasion of private rights; and, he is subject to the actions of a Court of Impeachment for a misuse of the power reposed in him. But, it is contended that the Courts do not have the power by injunction to restrain him from using militatry forces to suppress insurrections or to control the details in which the military forces may be used when in the exercise of his discretion he has determined that insurrection exists or impends and that military force and the taking of property are necessary to restore the peace.

It is respectfully submitted that the Governor of Texas, having determined in the exercise of his dis-

cretion that a state of insurrection existed and that there was imminent danger thereof; and having found that the use of military forces was necessary to preserve the peace, restore order and enforce the law; and having further found that to make effective his proclamation and accomplish a restoration of peace and order, it was necessary to control the production of oil from the oil wells located in the affected area; the Courts are without power on an injunction proceeding to restrain or control these acts of the Governor.

WHEREFORE, it is respectfully submitted that the judgment of the Trial Court should be reversed and that the injunction heretofore granted should be dissolved.

Respectfully submitted,

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CHARLES ELMORE

IN THE

Supreme Court of the United States

Consolidated—No. 446, October Term, 1931;
No. 453, October Term, 1932.

R. S. STERLING, GOVERNOR OF TEXAS,

Et Als., *Appellants,*

vs.

E. CONSTANTIN, Et Al., *Appellees.*

BRIEF FOR APPELLEES

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SUBJECT INDEX

Subject	Page
ARGUMENT	18 et seq.
(Summarized)	18-20
Arbitrariness—Due Process Denied	20-34, 57
Constitution of United States Violated:	
Due Process Denied	20-34, 57
"Judicial Power" Terms Violated	26-28, 49-51
Constitution of Texas:	
Courts, Powers of Under	13-34, 58, 138-172
Departments, Separated By	53-54
"Discretion" Claimed, Witheld by	40, 45
Distinctive as to Restrictions	33-34, 44, 53, 54, 58, 67, 71, 74, 182, 188, 189, 192
Due Process, Denied	20-34, 57
Earlier Constitutions	132-135, 135-138, 168, 182-183
"Habeas Corpus," Never Suspendible	43, 65-67, 70, 72
Histroy:	
General, Relevant to Making of Constitution	74 et seq.
Texas, Relevant to Constitutional Changes	65, 136, 137, 172-185
Judicial Power, None Given to Governor	64, 68-69, 72
Laws, Not Suspendible by Governor	40, 60-63, 64-65, 68-70, 71, 172-185
Military Subordinate	58, 68, 70, 72, 138-172
CASE, Statement of	4-18
DUE PROCESS, Denied	28-34, 57
Arbitrary Action	20-28, 28-34, 57
Facts	4-5, 6
Pleading	4-5, 6

SUBJECT INDEX—Continued

Subject	Page
"EXECUTIVE PROCLAMATION"—Shows Its Own Illegality	13-16, 21-26
FACTS, Statement of	2, 4, 13-18
Findings of	18-19, 20-21
"IMPLICATION"—That Claimed Is Negatived	31-34, 40-66, 68-72, 172-185, 188-192
"INSURRECTION"—Merely Fiated	20-28, 35-38
"MARTIAL RULE," Validity of Impossible	31-34, 40, 138-148, 172-185
PLEADING, Statement of	4-18

TABLE OF CASES

Case	Page
Arroyo vs. State of Texas, 69 S.W. 504	65, 183
Barbier vs. Connally, 113 U.S. 27	29
Benedict, Ex Parte, Fed. Cas. No. 1292	67
Bollman, Ex Parte, 4 Cranch 74	32, 66, 67, 91
Boyle, In Red, (Idaho) 45 L.R.A. 832	189
Charming Betsy, The, 2 Cranch 63	91
Commonwealth vs. Shortall, 206 Pa. 165; 65 L.R.A. 193	190
Coupland, Ex Parte, 26 Texas 387	33, 51, 53, 62, 63, 138-148
Darley, Ex Parte, 246 S.W. 91	51
Davis, Gov. of Texas vs. Gray, 16 Wall. 203	193
Dent vs. W. Virginia, 129 U.S. 114	29
Eliza, The, 4 Dallas 36	90
Emancipation Cases, 31 Texas 504	53, 168-172
Field, Ex Parte, 5 Blatch. 63	43, 66
Flying Fish, The, 2 Cranch 170	91
G. H. & S. A. Ry. vs. State, 81 Texas 572; 17 S.W. 67	69
Galpin vs. Page, 18 Wall. 350	22
Halsell vs. Renfrow, 202 U.S. 287	21

TABLE OF CASES—Continued

Case	Page
Henderson vs. R. R. Comm., 56 Fed. 2nd 218	18, 23
Home Tel. & Tel. Co. vs. Los Angeles, 227 U.S. 278; 57 L. Ed. 516	29
Houghton vs. Payne, 194 U.S. 88, 99-100	69
Johnson vs. Dunca, 3 Martin's La. Rep. O.S. 520	67, 92
Judkins vs. Robinson, 109 Texas 6; 160 S.W. 955	69
Kemp, In Re, 16 Wis. 360	67
Lancaster, Earl of, Attainder	78
Luther vs. Borden, 7 How. 1, 12 L. Ed. 581	32, 45, 62, 88, 186-7
M. P. Ry. Co. vs. Humes, 115 U.S. 512	29
MacMillan vs. Comm., 51 Fed. 2d 400	18, 23
Manley vs. State, 137 S.W. 1137; 154 S.W. 1008	53
Martin vs. Mott, 12 Wheat 19; 6 L. Ed. 537	45, 186-7
Mayer, Ex Parte, 27 Texas 716	33, 53, 150-151
Mays, Es. Rel. vs. Brown, (W. Va.) 77 S. E. 243, 45 L.R.A. (N.S.) 996	187-8
McCall vs. McDowell, 1 Abb., U.S., 212	67
McDonald, Ex Parte, 49 Mont. 454, 143 Pac. 947, L.R.A. 1915-B 988	67, 190-191
Merryman, Ex Parte, Taney, 246 Fed. Cas. No. 9487	67
Milligan, Ex Parte, 4 Wall. 2, 18 L. Ed. 281	25, 30, 32, 34, 41, 55, 57, 63, 64, 66, 67, 193
Mitchell vs. Harmony, 13 How. 115, 14 L. Ed. 75	31, 87, 193
Montana Min. Co. vs. St. L. Min. Co., 152 U.S. 160, 38 L. Ed. 398	38
Moore, Ex Parte, 64 N. C. 807	67
Moore vs. Bell, 95 Texas 151, 66 S.W. 45	18, 25
Mostyn vs. Fabrigos, 1 Cowp. 180	86-87
Moyer, In Re, 35 Col. 159, 85 Pac. 190, 12 L.R.A. (N.S.) 979	52, 70, 71, 188-9
Moyer vs. Peabody, 212 U.S. 78	52, 70, 188
Myres Salt Co. v. Iberia Dr. Dist, 239 U.S. 478	29
Osborn vs. Bank of United States, 9 Wheat. 732	21

TABLE OF CASES—Continued

Case	Page
Rose Mfg. Co. vs. W. U. Tel. Co., 251 S.W. 337	53
Settlemeir vs. Sullivan, 97 U.S. 444	22
Spann vs. City of Dallas, 111 Texas 350, 360, 235, S.W. 513	29
State vs. Sparks, 27 Texas 705, 27 Texas 627	32, 33, 53, 66, 157-168
Statutes:	
Texas "Conservation Law"	23, 46
Texas Militia Statutes	47-52
Texas Militia Statutes Void, etc.	46, 52
Swartout, Ex Parte, 4 Cranch 74	91
The Styria vs. Morgan, 186 U.S. 1	21
Turman, Ex Parte, 26 Texas 708	32, 53, 148-150
United Shoe Mch. Co. vs. U.S., 258 U.S. 451	21
United States vs. Fairbanks, 181 U.S. 283, 311	69
United States vs. Fischer, 280 Fed. 208	189-190
United States vs. Lee, 106 U.S., 28 L. Ed. 171	29-30, 193
United States vs. Russell, 13 Wall. 623	31
United States vs. Tanner, 147 U.S. 663	69
Virginia, Ex Parte, 100 U.S. 339, 346, 25 L. Ed. 667	29
Virginia vs. Rives, 100 U.S. 313, 25 L. Ed. 667	20
Wexler vs. State of Texas, 241 S.W. 231	18, 23
Wichita R. R. & L. Co. vs. Pub. Ut. Comm., 250 U.S. 48, 50	18, 23
Wolters vs. United States, 268 Fed. 69	186
Yick Wo vs. Hopkins, 118 U.S. 356, 370, 30 L. Ed. 220	29

IN THE

Supreme Court of the United States

Consolidated—No. 746, October Term, 1931;
No. 453, October Term, 1932.

R. S. STERLING, GOVERNOR OF TEXAS,

Et Als., *Appellants,*

vs.

E. CONSTANTIN, Et Al., *Appellees.*

BRIEF FOR APPELLEES

I

STATEMENT OF THE CASE

Appellees regard the "Statement of the Case" as made in Appellants' Brief as being inaccurate and incomplete,—especially so in view of the fact that their propositions would seem to invite the Court to review voluminous evidence touching various questions presented in their Assignments and Argu-

ment. Appellees will undertake, here, to offer a somewhat fuller statement of the Record.

A.—APPELLEES' TITLES AND OWNERSHIP, ETC.

In the year of 1867, or thereabout, the State of Texas, for valuable considerations, contracted to sell and convey and did sell and convey to Appellees' remote vendors the lands involved in this suit. The title thus contracted for and conveyed was absolute fee simple. The contract provided for conveyance of (and there was conveyed), as part of the lands and title, all minerals therein or producible from or by means thereof with full right to take, use or "squander" any and all minerals (solid, liquid, gaseous and "fugacious") in or that might, at any time, be in the lands. And such minerals and titles thereto and rights with respect thereto, by and through valid contracts and conveyances supported by valuable considertions and ante-dating enactment of the so-called "Conservation Statutes" hereinafter refererd to or other statutes relied upon by Appellants, were acquired, and are now owned, by Appellees. (R. 5-6, 20-21, 167). Stephens County vs. Mid-Kansas Oil & Gas Co., 113 Texas 160, 254 S. W. 290. Upon these lands, and at great expense, Appellees had (prior to effective date of such statutes) properly drilled and equipped various wells, each of which was properly capable of producing

5,000 barrels (or more) of valuable oil per day; and upon such lands Appellees desired and intended so to drill and equip other wells. Such completed wells were (and such intended wells would have been) properly operated; and Appellee's had proper facilities for saving and handling the oil and had available markets for all oil that might be produced from their wells. (R. 11, 13-14, 24, 25, 26). Such oil had a market value of from 68 cents to 83 cents per barrel. (R. 26) and each of Appellees, if allowed to operate their completed wells to the extent of their proper capacity, would receive a net income from such operation of at least $45,000.00 per month. (R. 26-27). Each of the wells of Appellees, on and prior to August 12, 1931, was capable of producing and (properly operated, as it was) was producing at least 5,000 barrels of oil per day,—all without "waste" of any kind. (R. 11, 13-14, 24-26). By and through inauguration and maintenance of "Martial Law" and conduct of Appellants thereunder Appellees were caused and forced to abandon any production of oil from such wells from August 17, 1931, until on or about September 5, 1931 (R. 63, 283); thereafter and until September 18, 1931, Appellees were caused and forced to restrict production of oil from each of their wells to 225 barrels per day (R. 68); from September 18, 1931, until October 10, 1931, such production was so restricted to 185 barrels per well per day (R. 68-69); there-

after such production was so restricted to varying lesser amounts so as that at time of the trial of this case in January, 1932, Appellees were permitted to produce from each of such wells only 100 barrels per day (R. 69-70, 73, 85, 94, 95, 96).

B.—THE PLEADING AND EVIDENCE

Because of the sources and nature of Appellees' titles and ownership, as above described, Appellees, in their pleading, claimed and asserted that the acts and conduct complained of, and the statutes and constitutional provisions of the State, if any, which undertake to warrant such acts and conduct, operated impairment of the obligations of the contracts under which the State parted with title to the lands in question and the mesne contracts and conveyances under which Appellees acquired those titles,—all in violation of Sec. 10 of Art. I of the Constitution of the United States (R. 2-3, 31, 49-50). Appellees, in their pleading, also claimed and asserted that such acts and conduct, and stautes and constitutional provisions (if any) attempting to warrant same, violated the due-process and the equal-protection clauses of the Fourteenth Amendment of the Constitution of the United States (R. 2-3, 31-32, 49-55) in that such stautory and constitutinoal provisions (under which Appellants claimed to act, (R. 48, 49-50), were and are arbitrary and capricious, fatally ambiguous and indefi-

nite and attempt to delegate to and vest in enforcing officers unrestricted and unbridled power and discretion (R. 2-3, 31-32, 50-55) and in that the acts and conduct of Appellants, et. als., were and are arbitrary, capricious and unjust and in user of unrestricted power and "discretion" (R. 2-3, 31-32, 49-55) and, while done under claim or color of authority of such laws, such acts were and are being done in bad-faith and pursuant to wrongful and unlawful conspiracy, agreement, intent and purpose and for the wrongful, fraudulent and unlawful purpose (amongst others) of attempting to affect market prices of oil by so controlling and restricting production thereof (R. 27-30, 32-39, 44-56).

The suit having been filed October 13, 1931, (R-1), and therein application for restraining order and temporary injunction order having been made (R. 18) and presented to Honorable Randolph Bryant, District Judge, and thereupon (on said day) order having been duly signed, made and entered in the cause restraining Appellant Wolters, et als., from interfering with Appellees in production of oil from their wells and setting the matter of the application for temporary injunction (of like effect) for hearing for October 28, 1931, and Appellant R. S. Sterling, claiming to act as Governor, having thereupon (on said day) ordered Appellant Wolters, et als., to ignore such restraining order and to obey only the Governor's orders and Appellant Wolters

and his military sub-ordinates having continuously refused to obey such restarining order under claim of authority from the Governor R. 288, 289, 291, 370-371, 372, 377, 378, 379-80, 381), Appellees, by amended and supplemental Bills claimed and asserted, additionally, that the acts and conduct of Appellants and any provision of the statutes of the State which attempted to warrant such acts and conduct were in violation of various provisions of the constitution of the State and of the contract, due-process and equal-protection clauses of the Constitution of the United States as well as in violation of those provisions of paragraph 2 of Article VI and Sections 1 and 2 of Article III of the Constitution of the United States wherein, respectively, it is declared that the Constitution and constitutional laws of the United States shall be the "supreme law of the land" and that the "judicial power of the United States shall be vested in one supreme court and in such inferior courts as the Congress may, from time to time, ordain and establish" and that "the judicial power shall extend to all cases in law and equity arising under" the Constitution and laws of the United States whereby the said United States District Court was established and vested with jurisdiction over the parties to and subject-matter of this cause (R. 50-52).

Appellants filed their Answer in the cause Decem-

ber 23, 1931 (R. 55). Therein: It was denied that the acts and conduct of Appellants were not warranted by terms of the constitution and statutes of the State (R. 62) but, it was averred, same had that warrant (R. 80-81); it was admitted that "Martial Law" was declared August 16, 1931, put into effect August 17, 1931, and kept in effect up to time of trial (with intention to keep it in effect for an indefinite time in the future) was admitted (R. 62, 63, 68, 71, 72, 73, 75, 77-78, 79, 80-83, 85, 86),—and the pleading describes the enterprise as being a "military" one (Ibid.). Under such "martial law" and acts of the Governor as "Commander-in-Chief" and acts of the other Appellants, under claimed warrant of the "Executive Proclamations," it was admitted that Appellants had from August 17, 1931, to September 2, 1931, completely "shut down" Appellees (and others') wells (R. 63). For the period September 2, 1931, to October 13, 1931, it was admitted that production from each of such wells had been allowed in amounts only as follows: 225 barrels per day, September 2, to September 18 (R. 68); 185 barrels per day September 18 to October 10 (R. 68-69); 165 barrels per day October 10 to October 13 (R. 69-70). Up to the latter date (i.e., October 10, 1931), it was alleged, Appellants, by "Executive Orders," were enforcing the "allowable" prescribed by orders of the Railroad Commission of Texas R. 68-70); after that date, it was

admitted and alleged, the Railroad Commission "had neither exercised nor attempted to exercise any supervision over the amount of oil to be produced by wells" (including those of Appellees) "located in the Military District" (R. 73), that the latest order made by the Railroad Commission expired by its own terms October 31, 1931 (R. 73) and that since October 13, 1931, "R. S. Sterling, Governor of Texas, and Jacob F. Wolters, acting under the command of R. S. Sterling, have * * * restricted the production from oil wells in the Military District" (R. 73) as follows: 165 barrels per well per day, October 13 to October 28 (79); 150 barrels per well per day, October 28 to November 7 (R. 73, 85); 125 barrels per well per day, November 7 to ——— (R. 85), at time of the trial such production was being so restricted to 100 barrels per well per day.

Appellants, in their said pleading, claimed authority thus to inaugurate and enforce "Martial Law" and the acts complained of thereunder by reason of (claimed) "facts" stated in the pleading and, partly, in an "Executive Proclamation" (to be described), R. 62, 77, 80, 90-93 and the Governor's alleged BELIEF from such "facts" that "insurrection," etc., would result in the "Military District" unless such things were done. The "facts" and deductions drawn therefrom are thus stated in the

Answer (R. 81-86). Prior to August 16, 1931, the Governor had investigated the conditions in what is called the East Texas Oil Field; in that territory is a vast deposit of petroleum (of estimated potential production of several million barrels per day); land and royalty owners will ultimately be benefitted by the largest ultimate aggregate recovery from the field and their benefits will be "contingent upon the market price of crude petroleum oil;" the market price of oil was then very low; drilling and production (account of inadequacy of Texas laws, etc.) "proceeded in a disorderly and haphazard manner;" a large majority of land and royalty owners believed that the maximum ultimate recovery of oil was being menaced by such operations and that such manner of operations "was in great part responsible for the low price of crude oil;" the confusion incident to such manner of operation gave opportunity (which was taken) to "avoid payment * * * of royalties to which said citizens were justly entitled;" because of such beliefs the citizens * * * were determined that" such "conditions must cease" and many of them were prepared to and intended "to resort to force and arms to accomplish this end in the event it should not be brought about by the duly constituted authorities of the State" and in the attempt the "anti-social and lawless individuals" in the territory would have joined; many of the operators were

"disregarding and setting at naught the conservation laws of the State and the orders of the Railroad Commission of Texas entered thereunder" but that such laws and orders, even if enforced, "would not and could not restore" the Counties named "to a state of tranquility or prevent the danger, which was imminent, of insurrection, tumult, riot, breach of the breach and general disorder;" "accordingly and basing his decision upon the foregoing facts and for the purpose of suppressing then existing state of insurrection, tumult, riot and breach of the peace, and preventing insurrection * * * tumult and breach of the peace, which were imminent," the Governor issued his "Proclamation No. 8447" (August 16, 1931) and "declared martial law in the Counties of Gregg, Upshur, Rusk and Smith;" the Governor then believed that "martial law" would be shortlived because, he believed, "adequate laws and proper orders issued thereunder would speedily be contrived" and enforcement thereof would enable him to "lift martial law" from such area; but,—

> "This, however, has not come about. On or about the 13th day of October, 1931, this Honorable Court issued a temporary restraining order, restraining the Railroad Commission of Texas from enforcing its Order, limiting the production of oil in the East Texas oil field to 185 barrels per well per day in so far as the properties and/or wells of the plaintiffs herein were concerned, and restraining other named parties, including the defendants, Jacob F. Wol-

ters and W. W. Sterling, from so enforcing said Order. The effect of this Restraining Order was to paralyze the efforts of the Railroad Commission and of the defendants, Wolters and W. W. Sterling, in so far as said Wolters and Sterling, or either of them, were enforcing said Order of the Railroad Commission to restrict or limit the production of oil in the East Texas Oil Field.

"The effect of this enforced inability of the State Authority, charged under the Constitution and laws of Texas with the duty and authority to regulate the production and insure the conservation of natural resources in this State, and the similar inability of the defendants, Wolters and W. W. Sterling, to assist the Railroad Commission of Texas to that end, created an extraordinary emergency. The people of Gregg, Upshur, Rusk and Smith Counties became excited, alarmed and inclined to take the law into their own hands. Defendants, and especially the defendants Jacob F. Wolters and R. S. Sterling were informed and believed, and now believe, that if the East Texas Oil Field were permitted to produce in excess of 400,000 barrels of oil per day, or if any particular well, including especially the wells of Plaintiffs, were permitted to produce an amount of oil running into thousands of barrels per day, the people of Gregg, Upshur, Rusk and Smith Counties would consider that the East Texas Oil Field was being operated and exploited in a manner calculated to prejudice seriously the ultimate recovery of large quantities of oil in which the citizens of said counties had and have a financial interest, contingent upon and proportionate to the ultimate recovery of a maximum amount thereof. Defendants were informed and believed, and now believe, that the citizens of said counties

did further believe that the production in the East Texas Oil Field of an amount of oil greater than 400,000 barrels per day, or if any particular well, including especially the wells of Plaintiffs, were permitted to produce an amount of oil running into thousands of barrels per day, would cause the price of oil to drop forthwith from its then figure of 68 cents per barrel, less a gathering charge of approximately 5 cents per barrel, to a price of 15 cents or less per barrel, or at least to fall to a very low figure, to the financial detriment of those citizens owning lands, leases or royalties in said counties of Gregg, Upshur, Rusk and Smith. Defendants were informed and believed, and now believe, that by reason of their belief, which these Defendants consider to have been correct, the citizens of said counties would take the law into their own hands; that dynamite and fire would be utilized in a desperate attempt to prevent the production of oil in said counties, with the probability of great less of property and the possibility of the loss of human life, and that the general disorder necessarily contingent upon such acts would have been instantly and violently increased by lawless and anti-social individuals, then present in said counties.

"Being informed and believing as aforesaid, the Defendant R. S. Sterling, as Governor of Texas, in order to prevent the conditions hereinabove described, issued his Order to Jacob F. Wolters, Commanding Officer of the Military District above described, to limit the production of oil in said District to 165 barrels per well per day, and said Order was executed by the Defendant Jacob F. Wolters, as the Order and command of R. S. Sterling, Governor of Texas and Commander-in-Chief of its Military Forces,

his superior and commanding officer." (R. 81-85.)

"It is the purpose and intention of the Defend, R. S. Sterling, Governor of Texas, to enforce and administer Martial Law in the counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, so long as he deems this necessary in order to suppress insurrection, tumult, riot, and breach of the peace in said counties, and so long as he deems it necessary in order to prevent insurrection, tumult, riot and breach of the peace therein, and so long as he deems it necessary in order to enforce and uphold in said counties the majesty of the law; and that it is his further intention to lift Martial Law from said counties as soon as it can safely be done with relation to the existing emergency therein." (R. p. 86.)

The "Proclamation" of the Governor of date, August 16, 1931 (R. 90-93) is referred to by Appellants as merely declaring "a state of insurrection, tumult, riot and breach of the peace to exist" in the Counties of Gregg, Upshur, Rusk and Smith. Therein and thereby the Governor did declare that certain conditions (described in preceding parts of Proclamation) exist in the counties named and that "by reason of this the conditions contemplated in Article 5889 of the Revised Civil Statutes of Texas of 1925" existed in those counties. The Statute thus referred to (i.e. Article 5889) declares:

"Whenever any portion of the military forces of this State is employed in aid of the civil au-

thorities, the Governor, if in his judgment the maintenance of law and order would thereby be promoted may, by proclamation, declare the county or city in which the troops are serving, or any special portion thereof, to be in a state of insurrection."

The recital just mentioned is followed in the Proclamation by the following declaration (R. 93):

> "And I do hereby declare Martial Law in said territory, effective at six A. M. the seventeenth day of August, A. D. 1931; and I hereby direct Brigadier General Jacob F. Wolters to assume supreme command of the situation in the territory affected and without delay shut down each and every producing crude oil well and/or producing well of natural gas, and to further take such steps as he may deem necessary to enforce and uphold the majesty of the law, subject to the orders of the Governor of Texas and Commander-in-Chief of the military forces of this State, as given through the Adjutant General."

The aforesaid declarations of the existence of "insurrection" and of "martial law" were (in the proclamation) based upon certain "Whereases" or declarations, to-wit: First: That "oil and natural gas or natural resources of this State" and the preservation and conservation thereof are made public duties and "waste"t hereof is prohibited by Statute effective August 12, 1931 (R. 90). Second: "An organized and intrenched group of crude petroleum oil and natural gas producers" in said counties "in a state of insurrection against the con-

servation laws of the State * * * and/or in open rebellion against the efforts of the constituted authorities of this State to enforce such laws" (R. 90-91) and by reason of reckless, unlawful, etc. "handling of producing wells in said district water is being rapidly drawn into the oil sands * * * creating enormous physical waste of crude petroleum oil and * * natural gas" with consequent "loss of revenue to this State" and injuries to educational institutions (R. 91). Third: "The existing condition has brought about a state of public feeling on the part of citizens that if the State Government cannot or fails to protect the public interest and the interest of land and royalty owners, they will attempt to take the law into their own hands and by force or arms shut down producing oil wells in said defined district until the State can and will enforce the conservation laws" and "this condition has caused threats of acts of violence on the part of indignant, responsible citizens against those who openly, flagrantly and rebelliously violate the laws and defy the constitutional civil authorities of this State (R. 9-92). Fourth: Thereupon, it was declared, "a state of insurrection, tumult, riot and breach of the peace does exist in the defined area" and in addition thereto "there is now imminent danger of said insurrection * * * being extended not only in the territory heretofore described, but in other areas of this State where oil and natural gas

is being produced by operators who are obeying the laws relating to the conservation of crude petroleum oil and natural gas (R. 92). And, fifth, "It is necessary for the preservation of crude petroleum oil and natural gas in the defined district that the reckless and illegal exploitation of the same be stopped until such time as the said resources may be properly conserved and developed under the protection of the civil authorities and (by Section 10 of Article 4 of the Constitution of Texas) it is made the duty of the Governor to "cause the laws to be faithfully executed," and by Section 7 of Article 4 of the Constitution of Texas, the Governor is given "power to call forth the militia to execute the laws of this State" (R. 92).

Appellants placed themselves and other witnesses upon the stand to prove conditions. But the proof, without dispute, shows there was no "insurrection" on or after August 16, 1931; its maximum import is that certain "land-owners," "royalty owners" and "operators" had become somewhat "excited" about supposed prospective losses to them unless there was enforced restriction of oil-production and, vaguely, threatened to "take the law into their own hands." R. 368-9, 284, 285, 296-7, 298, 300-301, 304, 305-6, 335, 336, 337-9, 341-3, 352, 353, 358-9, 360-2, 363-4. The proof, without dispute, shows that all courts,—State and National,—were at all times

open and functioning and that there had not been any obstruction of their processes. R. 301-3.

The trial court found, as facts: "The claim" that "war conditions were prevailing in the field" and that "military necessity required the action" taken is "wholly without support in the evidence;" at "no time has there been any actual uprising in the territory,—at no time has any military force been exerted to put riots or mobs down;" there was never "any actual riot, tumult or insurrection, which would create a state of war;" "the evidence shows no insurrection nor riot, in fact, existing at any time, no closure of the courts, no failure of civil authorities; the claimed "belief" that restriction of oil-production was necessary to keep down "riot or insurrection" has "no warrant in the evidence." R. 108, 109; 57 Fed. 2d 231.

In a practical sense there was not on August 16, 1931, or for some time thereafter, any statute in effect undertaking either to restrict production of oil or to authorize the Railroad Commission of Texas or other officers to cause such restriction. The statute referred to in the "Executive Proclamation" of August 16, 1931, (R. 90-93),—i.e., the "Conservation Law" so-called,—was passed and approved August 12, 1931. It is known as "Chapter 26, Acts of the Forty-Second Legislature, first Session, 1931." It does not purport to be self-execut-

ing in any respect; but if in this there be error, the proof (Appellees' verified Bill introduced in evidence) is that Appellees had not violated any of its terms,—that is, they had not committed "waste," etc. So-far-as restriction of oil-production is concerned, at least, the statute makes its operative effect dependent upon findings and orders made by the Railroad Commission and enforcement of the statute is placed, exclusively, within the power and discretion of the Railroad Commission. MacMillan vs. Railroad Comm., 51 Fed. 2d 400; Henderson vs. Railroad Comm., 56 Fed. 2d 218; Moore vs. Bell, 95 Texas 151, 66 S. W. 45; Wexler vs. State of Texas, 241 S. W. 231; Wichita Railroad & Light Co. vs. Public Utilities Comm. of Kansas, 260 U. S. 48, 58, 59.

II

SUMMARY OF ARGUMENT

A. The Trial Court, expressly or impliedly, found: First, that there was no "insurrection" or "riot," in fact, at the time of the declaration of martial law; second, that there was not at any time warrant for alleged belief of the Governor, et. als., that riot or insurrection would ensue if oil production was not restricted; third, that the Courts—State and National—were at all times open and their processes at all times were unobstructed—"the refusal of defendant Wolters to observe the

injunction in this case" being the only instance wherein there has been interference with the "civil authorities or courts * * * or their processes" (R. 108, 109; 57 Fed. 2nd, 227, 231).

B. The so-called "Executive Proclamations" (R. 93), the Appellants' pleading (R. 81-86) and the proof amply warrant said findings.

C. The due process clause of the Fourteenth Amendment precludes existence of an "irrebutable presumption" in favor of State action or action of State officers.

D. The constitution and statutes of the State of Texas do not confer upon the Governor of the State the power to declare or maintain "martial law" or to do or cause to be done the acts of which complaint is made.

E. If, as and to extent that any statute of the State of Texas undertakes to confer any such authority upon the Governor of the State, such statutory provision is void because it conflicts with the Constitution of the State of Texas and with the contract, due process and equal-protection clauses and other provisions of the Constitution of the United States.

F. Even if the Constitution and/or statutes of the State of Texas undertake to confer such author-

ity on the Governor of the State and/or his subordinates, the acts and conduct of the Governor of the State and his subordinates (of which complaint is made) were and are arbitrary, capricious, oppressive and unjust, in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

III
ARGUMENT

The Courts were open in the territory which became the "military district." There was no obstruction of the processes of the Courts. A single exception is Appellant Wolters' refusal to yield obedience to the restraining order entered in this cause by the District Court of the United States. This was found as a fact by the Trial Court (R. 108) and it was declared, also, in the testimony of Appellant Wolters. (Record 301-302).

"At no time has there been any actual uprising in the territory" and "at no time has any military force been exerted to put riots or mobs down."

There was "never any actual, riot, tumult, or insurrection * * * but * * * if all the conditions" which the Governor and his witnesses described as threatened "had come to pass," they would have resulted merely in breaches of the peace * * * and

not at all in a condition consisting of or remotely resembling a state of war." There is "no warrant" for the "belief" (professed by Appellants) that "riot or insurrection, in fact a state of war, would ensue" unless Appellants had taken the action (complained of) to restrict the production of oil "down to within 400,000 barrels." There has not been at any time "any condition resembling a state of war." Such were the findings of the Trial Court (R. 108-09; 57 Fed. 2d, 231) and each of those findings has the support of undisputed evidence.

As we read their Brief, Appellants do not claim either that the above described findings of the Trial Court are without support in the proof, or that there is in the record any evidence whatever to support a different view. We respectfully submit, therefore, that the findings reach this Court with, at least, "presumption of correctness" (United Shoe Machinery Company vs. U. S. 258; U. S. 451, 455, Halsell vs. Renfrow, 202 U. S. 287, 291-2); and that presumption, we think, will be rendered conclusive by any review of the proof.

In truth, that which Appellants claim to be irrebutable proof of existence of "insurrection" wears upon its face manifestation of its inherent vices. They plead the "Executive Proclamation" of August 16, 1931, as such proof; yet that document (R. 90-93), at least when read with the practical interpre-

tation given in Appellants' Answer (R. 81-85), affirmatively shows that "riot" and "insurrection" did not exist and that, therefore, the Governor did not form or declare any judgment whatever based in discretion,—unless and contrary to all reason (Osborn vs. United States Bank, 9 Wheat. 737,863; The Styria vs. Morgan, 186 U. S. 1, 9) "discretion" or "judgment" may signify "arbitrary will," "mere caprice" or "inconsiderate action." If, therefore, we agreed (and we most emphatically disagree) with Appellants' contention of possibility of existence of an "irrebutable presumption" in favor of State offcers, we might yet properly contend that the instrument adduced to establish the presumption destroys, by its own terms, all reasonable bases therefor. And we might, then, properly analogize:—A judgment of a court of competent jurisdiction which correctly recites necessary jurisdictional facts or which remains silent in respect thereof is, ordinarily, immune to collateral attack; but what of a judgment which recites facts negativing jurisdiction or which generally declares jurisdictional steps to have been taken and, then, describes insufficient or improper steps as those which were, in fact, taken? (Galpin vs. Page, 18 Wall, 350, 366; Settlemeir vs. Sullivan, 97 U. S. 444, 447).

By introductory sections of the instrument claimed bases of the Governor's action are described.

Reference is there made (R. 90, 91) to the "Conservation Law", approved August 12, 1931. Of that statute (Ch. 26, Acts of Forty-Second Leg., 1st Called Session, 1931) at least two things ought be noted here: First—It repealed pre-existent conservation laws. Second—Its practical-effectiveness depended upon findings and orders made (after notice and hearing) by the Railroad Commission of Texas (R. 139; 57 Fed. 2nd 242; MacMillan vs. Comm., 51 Fed. 2nd 400; Henderson vs. Comm., 56 Fed. 2nd 218; Moore vs. Bell, 95 Texas 151, 66 S. W. 45; Wexler vs. State of Texas, 241 S. W. 231; Wichita R. R. & L. Co. vs. Public Ut. Comm. of Kansas, 260 U. S. 48, 58, 59)—and, the Proclamation (R. 91) shows, no such findings or orders were in existence. The Proclamation, read with relevant terms of the statute to which reference is made therein and the "general law," discloses,—if, indeed it does not affirm,—that the declaration (R. 90) of existence of "an organized and intrenched group of * * * producers * * * in a state of insurrection against the conservation laws of the State" and of existence of "a state of insurrection" because thereof (R. 92) were untrue,—and the untruth thereof must have been known to the Governor unless abysmal ignorance is to be assumed. But if in this there be error and if it be true that violations of the "Conservation Law" were then possible and existent, the fact remains that the statute provided for its enforce-

ment by means (e. g. penalty and/or injunction suits) other than action by the Governor,—and all of the courts were open and their processes unobstructed (R. 108, 301-302); whatever else those "violations" may have been, they did not constitute "insurrection" (Ex Parte Milligan, 4 Wall. 2, 127, 18 L. Ed. 281).

The other basic recitals of the Proclamation are, in terms, given relation to what might happen in the future. E. G.,—"The existing condition" (i. e., alleged violations of the "Conservation Law") "has brought about a state of public feeling on the part of citizens, that if the "State government cannot or fails to protect the public interest and the interest of the land and royalty owners they will attempt to take the law into their own hands and by force of arms shut down the producing oil wells in said defined district." (R. 91-92).

That the meaning of the Proclamation, as understood by the Governor, is such as we have described is made plain by the practical interpretation given in the positive averments of Appellants' Answer (R. 81-85).

Hence, (we say) the Proclamation itself (i. e., that which Appellants present as evidence for "irrebutable presumption") disproves lawful use of lawful discretion or judgment (if any) by the Gov-

ernor. For it deals with and discloses, as basis for the Governor's act of claimed "discretion," a mere threat or fear of "insurrection" rather than a then-existent "insurrection." And, thus, it proves there was no warrant for "martial law" or for executive or military action, if any, lawfully predicable upon supposition of actual tumult; for "the necessity must be actual and present,—the invasion real, such as effectually closes the courts and deposes the civil administration" (Ex Parte Milligan, 4 Wall, 2, 127, 18 L. Ed. 281).

The situation thus existent at the beginning of martial regime stayed unchanged throughout the period.

Thus, it came to pass, lack of any basis in fact for the claim of warrant for the Governor's action or alleged uses of "discretion" was proved in the Trial Court in each and both of two ways:—First, —By the "Executive Proclamation" which was offered in defense; second, by extrinsic evidence. And that proof is summarized and given emphasized point in the findings (actual and presumed) made by the three judges who considered the document and who heard and observed the demeanor of the many witnesses (including Appellants) who testified relative to the matter.

And that which was a mere fiated "insurrection"

has been taken as warrant: First,—for calling out military forces; second, for use of those forces to deprive Appellees of the use and benefits of their properties; third, for thwarting and annulling the decree and process of the District Court of the United States and depriving Appellees of the benefits of such decree. As litigants, Appellees may not be interested in the matter of merely calling out the military and, arguendo, it may be assumed that the Governor has unchallengeable authority to do that; but they are vitally interested in the manner and extent of the use of soldiers to take their property and/or to thwart judicial orders made for their protection. Even if there were a presumption which excluded inquiry as to why troops were called out, still, they say:

First,—Use of soldiers to annul judicial orders (such as were made in this cause October 13, 1931) is in contempt of that provision of Sec. 2 of Art. VI of the Constitution of the United States wherein it is declared that such constitution and laws made in pursuance thereof shall be the supreme law of the land, and of that term of Sec. 1 of Art. III of the Constitution whereby the "judicial power of the United States" is vested in certain courts and of that part of Sec. 2 of Art. III wherein it is provided that "the judicial power shall extend" to cases in law and equity arising under such constitution

and laws made pursuant thereof, and of the terms of the laws of the United States creating the District Court of the United States in and for the Eastern District of Texas and vesting it with jurisdiction of such cases as that now presented. Such jurisdiction became *active* October 13, 1931; and, as a matter of course, it has not been suspended or destroyed, by reason of any action or non-action suffered in the cause. Yet by fiat of the Executive of another government, that jurisdiction has been invaded, interfered with and declared to be impotent. Its invocation and its exertion on October 13, 1931, was taken (according to the pleading and undisputed proof) as warrant for "martial law",—as continued or as re-inaugurated. That is to say, the Governor of Texas declared, and the other Appellants assumed (and acted upon the assumption), that the powers of the United States are wholly insufficient for enforcement of an order of its court and/or that those powers are wholly insufficient to put down or prevent "insurrection" (claimed to be) consequent or threatened as consequent of that court's act and that the more powerful Governor of Texas must thwart the impending catastrophe by forbidding obedience to the court's order. The supposed practical effect of the court's order and the supposed error or improvidence thereof, it will be remembered, were not presented to the court itself, as might have been done regularly and in decent

respect for orderly government; on the contrary, the actual effect was commanded (by ipse dixit of an Executive officer of the State) to be ignored and defeated, and that remarkable command is as yet outstanding,—even more, Appellants, in their Answer (R. 81-85, 86), say that they expect to keep the command outstanding and to have it executed for an indefinite future time. Of the spectacle thus presented it may justly be observed: (a) If it has anything like a precedent in history, that must have occurred upon actual subjugation, by conquering armies, of the people of whose government the thwarted court was a part. (b) It demonstrates beyond peradventure of doubt, we say, that the Governor and his subordinates have been and are acting in effort to restrict production of oil for the purpose of affecting its values (a purpose made unlawful by the Texas "Conservation Statute") and not for the purpose of preventing riots, disorder or "insurrection" and not for the purpose of causing the laws to be executed,—it manifests its badge of bad-faith or caprice, and amongst the things which it proves is the fact that the Governor did not exercise a "discretion" or form a "judgment" within his authority but, contrarily, refused to use "discretion" (if any he had by law) or to form a "judgment".

Second,—The Fourteenth Amendment (in the due- process clause) warrants inquiry as to neces-

sity, in fact, for taking or destroying Appellees' property and rights. We say that because, we say, the Amendment operates alike against the Executive, the Legislative and the Judicial departments and agencies of a State (Virginia vs. Rives and Ex Parte Virginia, 100 U. S. 313, 339, 346, 25 L. Ed. 667; United States vs. Lee, 106 U. S. 196, 29 L. Ed. 171; Home Tel. & Tel. Co. vs. Los Angeles, 227 U. S. 278, 57 L. Ed. 516), because arbitrariness in State action mocks due-process (Yick Wo vs. Hopkins, 118 U. S. 356, 370, 30 L. Ed. 220; Barbier vs. Connally, 113 U. S. 27, 31; M. P. Ry. Co. vs. Humes, 115 U. S. 512, 519; Dent vs. West Virginia, 129 U. S. 114, 123-4; Myres Salt Co. vs. Iberia Dr. Dist., 239 U. S. 478), because perversity of judgment on known facts or judgment or action on "facts" directly feigned or which(in ordinary intelligence) are known to be shammed is, essentially, arbitrary and because liberty or property rights cannot be duly subjected to the unbridled will of any functionary of government (Yick Wo vs. Hopkins, supra; Spann vs. City of Dallas, 111 Texas 350, 360, 235, S.W. 513). And while in the laws of many States verbal obeisance is yet made to phantom kings, a necessary effect of the Fourteenth Amendment is preclusion of all vestige of absolute official privilege. With the sweep of the Amendment (as described in Ex Parte Virginia and other cases just cited) in mind and in broad illustration of its

effect against absolutism, we repeat this eloquence, —pronounced with the return of Arlington (then used by the United States as a military reservation and as a National cemetery) to the Lees:—

> "There is in this country no such thing as a kingly head as to the nation or to any of the states which compose it. * * * No person in this government exercises supreme executive authority. * * * Under our system * * * the people are sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right." (United States vs. Lee, 106 U. S. 196.)

The Constitutions, and particularly the Fourteenth Amendment with its restraints on State action, are laws for 'rulers and people, equally in war and in peace', "at all times and under all circumstances." (Ex Parte Milligan). And lest we be thought somewhat intemperate in hatred of a concept of power in governmental agents to halt the due sweep of Liberty, we point to the sentiment of Justice Davis and paraphase his words: "No doc-

trine, involving more pernicious consequences, was ever invented by the wit of man than that any of the provisions of the constitution can be suspended during any of the great exigencies of government." (Ex Parte Milligan).

The argument of Appellants is marked by glaring inconsistency:—In one phase, it is claimed that the matter of actual necessity for taking property or suspending rights thereof may not be challenged,—i. e., existence of necessity and consequent legality is an "irrebutable presumption." In another phase, however, it is admitted that such a judicial inquiry may lawfully be made after the war is over and damages may then be recovered for wrongful taking of property,—this admission having been induced, no doubt, by a consideration of what was said in Mitchell vs. Harmony, 13 Howard 115, 133-134, and in United States vs. Russell, 13 Wall. 623, 628. The basic purpose of the inquiry in either case is that of determining whether the act complained of was lawful. The argument, then, is that the courts are limited as to remedies rather than that they are without power to make the basic inquiry. So much is indicated on page 47 of Appellants' Brief (in No. 746) where it is suggested that "the remedy of Appellees" is that of suits for damages prosecuted after the military forces shall have rested from their trespassing. And that suggestion is made despite the fact that Appellants are not

able to respond in damages!

But we have some book-proof to the point that the courts are able, by application of proper remedies, to halt trespassing soldiers even when they are parading in martial regime:—By write of *habeas corpus ad subjiciendum* (Ex Parte Bollman 4 Cranch 74) Milligan was taken from custody of the military men and put in the custody and at disposition of the court (Ex Parte Milligan, 4 Wall. 2, 18 L. Ed. 281) as were Turman (Ex Parte Turman, 26 Texas 708) and Peebles and others (State vs. Sparks and Magruder, 27 Texas 627, 705). The power to issue and enforce habeas corpus and, thus, to interfere with military operations, is certainly no broader than the power of a court of competent jurisdiction to apply and enforce other remedies,—e. g., injunctive process. And the general answerability for excessive, oppressive or perverse user of military power (even where "Martial Law" is properly in force) is declared in Luther vs. Borden, 7 Howard 1. On page 67 of their Brief (in No. 453) Appellants assume a case of actual war and upon that assumption present a question:

> "If the military forces in the field under declaration of 'martial law' are faced by the armed forces of insurrection and the officer in command orders his men to fire, is the Chancellor going to stand by and issue a temporary restraining order or intelocutory injunction to re-

> stratin the men from placing their forefingers upon the triggers of their rifles until in the quiet of judicial proceeding the pleadings can be heard, facts reviewed and a solemn judgment arrived at and entered as to the necessity for the command?"

The Supreme Court of Texas (in State vs. Sparks and Magruder, 27 Texas 627, 705, etc.) answers that the courts, at least, could take the targets away even when actual war prevails; and Ex Parte Milligan signifies that the Court can deprive the firing-squad of its intended victim, at least when "Martial Law" rests on mere fiat.

And whatever may be the law in Colorado or elsewhere, the law in Texas is that the courts may, at least "in a clear case," inquire into and interfere with use of "discretion" claimed to have been exercised in respect of war-measures, for (in Ex Parte, Mayer, 27 Texas 715, 719) it said:—

> "The power to raise armies has been exercised on grounds supposed to be proper by the party who is to judge of its propriety and necessity, and the presumption is not to be indulged that the power has been perverted, or that its exercise will be abused in a way to defeat rights secured by the constitution or reserved to the states; or, in other words, it must be a clear case of violation that will warrant the interference of the courts."

And previously (in Ex Parte Coupland, 26 Texas

387, 404-405) it was said, of the power to raise armies as used by those to whom authority to "judge of * * * propriety and necessity" had been given, that "though the necessity exists today, and the law is therefore constitutional, if tomorrow that necessity should cease, its continuance would be as clearly unconstitutional".

By those who sought unlawful death of Milligan (Ex Parte Milligan, 4 Wallace 2, 18 L. Ed. 281) it was claimed that martial law covered with its broad mantle the proceedings of their military commission; a like justification is hereby asserted by the Governor and General Wolters. That contention has its answer in what has been said already; it has its unyielding answer in the principles announced and applied in Ex Parte Milligan; yet, because of the emphasis with which it is pressed, we will give it detailed consideration in the pages which are to follow.

> **"Martial Law":—(a) The impossibility of lawful martial rule in Texas at any time, under any circumstances, by warrant of State action; (b) alternatively — the impossibility of lawful martial rule in Texas at any time, under any circumstances, upon EXECUTIVE ACTION alone; (c) further and alternatively—the arbitrary character (hence, the illegality) of the instant martial rule.**

By pleading, in testimony and by argument the

Court has been tendered the asserted paradox of co-existent executive absolutism and constitutional government. The essence of a paradox, it is to be remembered, is its truth,—actuality despite apparent impossibility; hence, we inquire about the foundation of the claim or whether there be left in the people of our country any of that liberty under law which has been our cherished supposition.

THE BASIC QUESTION POSTURED

No foot of Texas soil wears print of invader's heel; no breeze that ripples our woods or courses the plain kisses, to waft, a rebel flag; yet war is fiated on high, and a subjugated principality, eo instanti, writhes in imperious will of epaulated satrap.

Pursuit of happiness wends its tranquil way and insurrection's wild alarm assults not the public quiet; Justice is established, the courts are open and their processes, State and National, go unhalted and in undiminished vigor along the highway, upon the byway, into the hedges, whithersoever there be need; regimen exhibits its pristine efficacy and none there is, with hardihood abysmal, to deny existence of that Peace in whose aegis is wrapped the blessings of liberty. Yet a sudden Joshua, new born but stripped of ancient power, essays conjury and fanciful presentment of things not seen, hurls brutem fulmen at un-offending Sun in martial ex-

pectation that radiant day, on the moment, wear melancholy night's most sable robe. Mystic alchemy turns government of law to regal discretion, unrestrained and unchallengable as is unbridled and unquestionable the "multitudinous laughter of the sea." The prince's will, be it sane or insane, be it corrupt or be in pure, is now the law; at his contempuous demand sheriffs, marshals, judges, courts, all constituted authorities, must "crook the pregnant hinges of the knee" that life may "follow fawning." Privileges of origin more remote, even more respectable, than written law are suspended; rights bottomed in fundamental law must be yielded; even that liberty which comes with a man's being from the Creator and for whose integrity constitutions thrust forth the shields of their protection must be suppressed; and all walks in the train of martial Ipse Dixit.

For the existent condition American history affords no parallel, since in event of "martial law" heretofore transpiring those in assumed command had, at least apparent fact-situation of actual and wide-spread violence or apparent color of municipal law, whereas presently in Texas there is no violence in fact and only a fiat of that which every man knows is false to support the claim of right (by implication) to legalize treason and to put upon official banditry a caparison of respectability. The unchal-

lengable "fact" is that there is no isurrection; at most or worst, perfervid Imagination might erect on the "facts" anticipation of violence at some un-ascertainable place at some unknowable time, as it might do, indeed, on "facts" as they exist at any given time. Imagination, real or feigned (and, if real, sane or morbid) may, then, and according to the claim made, substitute executive absolutism for ordinary course of government and those whose rights are swept away may not, even in open courts, complain. Stripped of all deceipt, the basic syllogism is this: Martial Rule, during its period, is the sum of all power; the Executive, by his unchallenbeable fiat, may create the occasion and period and, thus, don Sovereignty itself,—bringing to pause all other regularly appointed agencies. Such "theory" of the Appellants is manifest in their propositions:—(a). "Martial Law is the supreme exercise of the police power," "Martial Law is the will of the commanding officer". (b) "The "Governor's proclamation established the fact of an isurrection and the necessity for Martial law," "The Governor's declaration that a state of isurrection exists cannot be controverted by anyone and cannot be questioned or reviewed by any court", The Governor necessarily must determine the necessity of declaring Martial Law, his determination is final and conclusive." (c) "During the existence of an issurrection the officers of the army should not be disturbed and harrassed

by law suits."

The basic question has been rightly postured. But if there were doubt that the claim or the actuality is as described, it ought yet be remembered that what, in fact, has been done may well be but the commencement and that, if what *has been done* can be justified, all *that may be done* is likewise justifiable. If the power exists at all, the very reason for its existence precludes all jural limitations on its active ranges, for the 'constitutional validity of law is to be tested not by what has been done under it, but by what may rightfully be done by its authority' (Montana Mining Company vs. St. Louis Mining, etc., Company, 152 U. S. 160, 172, 38 L. Ed. 398, 14 Sup. Ct. 506).

And in approach to consideration of the basic question it ought be remembered that what may lawfully be done by a conquering army in an alien field (except for its limitations) is beside the instant point, for we are confronted with military occupation at home. What may be done by an army in actual clash of force at home or abroad is likewise (except for its restrictions) an immaterial consideration, for we have peace and the utmost adversely claimed is that there might be violence but for martial staying of the ordinary processes of law. The militia has not been called out to execute municipal law; that is neither the purport nor the practice, for,

in such event, the military force would obey and not contemn what the civil law directs. The power to suspend municipal law and to substitute for it substantive, judicial and administrative provisions and means of enforcement is asserted and, in fact, exercised. Through bald assertion and actual conduct, the military is exalted above the civil authority and in the exaltation of the one and in the debasement of the other there is, ex vi necessitate, suspension of law witnessed by immemorial usage, declared by statutes and ordained in constitutions.

Whence proceeds this over-weening power that is claimed? By what privilege does it wear the tyrant's mien? The answer attempted is that there is an executive authority which is supreme and the Governor is its respositary. Otherwise stated: Recrudescent Louis XIV issues from universal charnel-house to re-proclaim, for the nonce, "I am the State."

If the conduct which now engages attention may be supported on a different postulate, grasp of the idea, we freely admit, is beyond our ken.

We are here to blast away at the Anomaly's foundations and to challenge its right to live for a single instant on soil dedicated in the sacrifical blood of freemen to the unending uses of freemen. If in the attempt resort is had to masculine language, warrant lies, we think, in the outrage which,

in our view, the paradox tenders to Justice and the insult which the anomaly thrusts at Common Decency.

THERE IS (EXCEPT IN THE PEOPLE) NO SUPREME POWER

To make is impossible that there should be in any officer or in all officers combined supreme authority of any kind was a particular objective of those who erected our State and prevised its maintenance. With this objective in mind and conscious of historical unsurpations which had resulted from allowing maxims of freedom to rest in implication, they first described as set apart unto all of the People, as contrasted with those who should wear the State's livery, a great body of liberties. Those rights were pronounced sacrosanct; and for them a perpetually inviolable character was decreed; all privilege of their impairment was expressly reserved to the People and excepted out of the "powers of government;" and, by way of emphasis, it was declared that "all laws contrary thereto * * * shall be void." The freedom and safeguards of liberty thus ordained in the Bill of Rights (Art. I, Const. of Texas) were given sacred character, it was said, in order to "guard against transgressions of the high power * * * delegated," whether legislative, executive or judicial. That freedom and its means must be protected at all hazards and against all efforts at its rape, else organized gov-

ernment is banditry and its minions outlaws. Supreme public policy is, so, organically declared, and its pronouncement ought not be circumvented through brazen unsurpation or pharisaical indirection, nor ought it be given an attenuated strength in response to vagrant notions of the general welfare or, it may be said, of public safety. Unless and until changed in the sovereign manner it is and must remain the unchallengeable declaration of what is general welfare and of what must not be violated even (upon claim) for "public safety." Existence and meaning of the Bill of Rights (if it be given meaning at all) projects thought of alternative phase: Either general welfare and public safety can be adequately served without contempt of its requirements or its restrictions or, else, the country is "not worth the cost of preservation" if its preservation must be "at the sacrifice of all the cardinal principles of liberty." (Ex Parte Milligan). *Ita lex scripta est.* The fundamental law of our jural creation being thus written, its vindication by all proper opposition to assaults upon it is a high duty of citizenship and the highest duty of the courts. The duty to observe valid laws is no higher than the duty to oppose invalid statutes or unwarranted conduct of officials. Human nature is such as to make anarchy a sure resultant of failure to observe the one duty and tyranny an inevitable consequence of negligence in the other respect.

This much has been said to express the truth that the words of the Bill of Rights, for sound reason and in right intendment, carve out from Sovereignty a vast body of power and leave it otherwise untouched in the People of Texas as an entirety and as contra-distinguished from the sum of power vested in the three Departments. The State of Texas is not the Legislature, nor its Executives, nor its Judiciary, nor yet all these combined. No more has all legislative power been delegated to the Legislature, nor all judicial power to the Judiciary, for, as remarked, a vast sum of each yet resides in the People. The People of Texas is the State of Texas, and any law or action which advances a different view, however good the immediate desires and objects of its movers, is no law or lawful action at all, but is bald usurpation. Pretence to absolutism by any officer or group of officers at any time or place is an intolerable claim whose monstrous character is denounced in every syllable of the Bill of Rights.

"Executive authority" or "Supreme Executive authority" in the sense in which the term is used by our adversaries, in the sense, indeed, in which they must use it in attempted justification of what has been done and is purposed, means no more and on less than power to suspend municipal law, inclusive of constitutional provisions apparently expressing sovereign will to the contrary. Martial Rule cannot exist, *e. g.*, save by way of suspension of Habeas

Corpus and its privileges. "Martial Rule" and unsuspended right to Habeas Corpus do not co-exist. Ex Parte Field, 5 Blatch. 63. The necessity of halting *Habeas corpus* process in order that "Martial Rule" may be efficacious is the theme of (or has recognition in) almost every case to which Appellants refer. To like effects are views of the bookmen: "Suspension of the writ of habeas corpus is essentially a declaration of material law." Messages and Papers of the Presidents, Vol. 10, p. 465. "Promulgation and operation of martial law within the limits of the Union would necessarily be virtual suspension of the habeas corpus writ for the time being." De Hart's Military Law, 18. "The declaration of martial law in the state has the effect of suspending it." Cooley, Const. Lay, 301. "Practically, in England and the United States, the essence of martial law is the suspension of the privilege of the writ of habeas corpus, that is, the withdrawal of a particular person or a particular place or district or country from the authority of the civil tribunals." Halleck, International Law, chap. 15, p. 375. See also May's Const. History, chap. 11. (p. 1006-7). Again: Promulgation and enforcement of "Martial Rule," *ex vi necessitate*, operates suspension of constitutional and statutory rights and remedies and laws therefor providing and, at once, manifests assumption by the Executive of legislative and judicial power. Such being (and such being the results of) the authority

claimed for the Executive, its assertion would provoke the thought that a power so astounding in its scope ought have witness in expressed grant if it have support at all. Certainly a reasonable mind would eschew the claims unless its proponent were able to prove a grant in expressed terms or by implications so clear and imperative as necessarily to preclude all doubt of existence of the power. Our adversaries, we think, cannot show existence of the power in any Executive in America or in any functionary elswhere save, perhaps, in those few countries wherein government yet wears the acknowledged form of absolute depotism. But if in this it be found we are mistaken and if it be found that somewhere American soil yet nurtures regal power despite of the Fourteenth Amendment, this will but develop the fact that Texans are distinctively free men under protection of a Constitution whose terms widely differ from the provisions of Constitutions of those States, if any, wherein Executives are supreme. We remark, in passing, that peculiarities of the Texas Constitution (to be developed at length presently) render inapplicable most, if not all, of the "authorities" cited by Appellants even if such "authorities" be regarded as sound law.

The illogic of a "supreme executive authority," or existence of such authority as Appellants claim, includes false premise laid on misconception and misapplication of the rule of construction (stated in

Martin vs. Mott. 12, Wheat 19, 6 L. Ed. 537, and in Luther vs. Borden, 7 How. 1, 12 L. Ed. 581) to effect that:

> "Whenever a statute" (or a constitution) "gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts * * * the statute" (or constitution) "considers him the sole and exclusive judge of the existence of the facts."

Of this rule generally it is to be remembered that (wherever applicable) it includes pre-supposition of lawful vesting of the power with which it deals and that its sound converse is that exercise of claimed "discretion" without the lawfully vested power is mere usurption challengeable anywhere and at any time. In respect of application of the rule to the doings of State officers it ought be remembered that (since Martin vs. Mott and Luther vs. Borden) the Fourteenth Amendment has interposed insuperable obstacles to existence or exercise of arbitrary power. And, as immediately touching the instant situation, these things are worthy of initial notice and continued recollection: First, our adversaries do not and cannot point to any *expressed* grant of the authority claimed; second, the power, if it exist at all, rests in *implication;* third, they blandly assume existence of the necessary implication and, thus, assume as settled the very question at issue. It is important, therefore, for us to examine the specific grants of power

as made in the relevant statutes and in the Constitution, the specific denials of power and the expressed and implied restrictions of powers actually granted. For if it be true that the Governor acted either without or beyond lawful jurisdiction, his proclamations are mere words without even the dignity of an ukase. A like resultant occurs if he has acted consonantly with a statutory grant and if the statute is in conflict with organic law.

POWER ACTUALLY GRANTED HAS DEFINITE RESTRICTIONS

With these general observations taken, we come now to particular notice of definite grants of restricted executive power and definite prohibitions of unchallengeable authority.

A. RELEVANT STATUTES

The "Conservation Law" (Ch. 26, Acts of Forty-Second Leg., 1st Called Session, 1931) remits to the Railroad Commission (and, thus, withholds from the Governor) discretion as to means and occasions for enforcement of its terms,—as has been pointed out in another connection above. A necessary result is that authority or "discretion" to enforce that statute by use of the military force or to predicate "martial rule" on its alleged violation is denied to the Governor.

The statutes cited and relied on by Appellants (pages 27-30 of their Brief) are those next discussed.

Art. 5778:

> "The Governor shall have the power in case of insurrection, invasion, tumult, riot or breach of peace, or imminent danger thereof, to order into active service of this State any part of the militia that he may deem proper * * *"

This statute in its grant or definition of power, as is manifest, has no relation to what use is to be made of the militia after it has been ordered "into active service."

Art. 5830:

> "When an invasion of, or an insurrection in, this State is made or threatened, or when the Governor may deem it necessary for the enforcement of the laws of this State, he shall call forth the active militia or any part thereof, to repel, suppress, or enforce the same, and if the number available is insufficient, he shall order out such part of the reserve militia as he may deem necessary * * *"

The language there used is not:—"When the Governor deems an invasion or insurrection to exist." The language used is:—"When * * * an insurrection * * * is made or threatened" the Governor "shall call forth the active militia * * * to suppress * * * the same." Taken literally the language used means that a real, —as distinguished from imaginary,—"insurrection"

must exist or be threatened before the militia may be called forth. In any view, the militia is to be used to suppress "insurrection" in fact and not to set aside or suspend statutory and constitutional rights; and there is absence of a vesting of authority in the Governor to determine what means are to be used in suppressing insurrection.

Art. 5834:

> "The Governor may order the active militia, or any part thereof, to assist the civil authorities in guarding prisoners, or in conveying prisoners from and to any point in this State, or discharging other duties in connection *with the execution of the law* as the public interest or safety at any time may require."

The authority here given is that of assisting "civil authorities" in "execution of the law" and not that of making the law or setting it aside.

Art. 5889:

> "Whenever any portion of the military forces of this State is employed **in aid of civil authority,** the Governor, if in his judgment the maintenance of law and order will thereby be promoted, may, by proclamation, declare the county or city in which the troops are serving, or any specific portion thereof, to be in a state of insurrection."

This statute does not purport plenary authority in the Governor to determine what means shall be em-

ployed after "a state of insurrection" has been declared.

Whatever authority is purported in Articles 5834 and 5889, supra, is predicated upon assistance to or aid of "civil authorities" as the purpose of calling-out or using troops, while "martial law" (and not "aid of civil authorities") is that which the Governor ordered and that which was put into effect. That the Governor and his subordinates assumed power to set aside existing laws, to make new laws and, then, to adjudge and execute new laws (or their own unrestrained will) is the plain meaning of this Record as well as the necessary admissions (directly or inferentially) made in Appellants' Briefs. E. G.,—That which the Executive Proclamation orders is "martial law" (R. 93); that which the General was ordered to do was "to assume supreme command of the situation" (R. 93); that which the military, in its first step, did was completely to "shut down" oil-wells (R. 283) although there is no pretense that *any* law required them to be shut down; amongst subsequent steps taken by the military were the making and enforcing of orders as to how much oil might be produced (R. 292-3, 302-3),—the Railroad Commission of Texas being the "civil authority," if any, given that power,—and the overriding of the District Court's restraining order entered in this cause (R. 288, 289, 291, 370-1, 372, 377, 378-381).

That the enterprise was and is "military," or intended to be such, was stated or implied: E. G., General Wolters:—

> "By orders of the Governor as Commander in Chief of the Texas National Guard, I was placed in charge of that field as the officer commanding the military forces there to enforce the orders of the Governor of Texas, and I am still so occupying that position."—(R. 282).
>
> "When we reached the oil field on the morning of August 17th, we had an order from the Governor to shut every well down. When we got there there were 1623 wells; the wells were flowing and my investigation disclosed that at least the last three days prior to our arrival produced approximately 1,400,000 barrels. We shut them down. They remained shut down until September 5th, from August 17th."—(R. 283).
>
> "The Witness: We shut the wells down."—(R. 286).
>
> "On the evening of October 13th William A. Vinson of this city was my guest at my headquarters. Approximately at 6 o'clock or a little past a newspaperman from Fort Worth telephoned me that Federal Judge Bryant, sitting at Tyler, had issued a temporary injunction restraining the Railroad Commission and myself from enforcing the order for the holding down of the allowable to 165 barrels. The newspaperman said that he did not want me to say anything about it, because he thought he had a scoop, that the other papers were asleep. To show my mental attitude about it I said, "I am afraid you are being spoofed; I don't believe

that Judge Bryant would issue a temporary order without notice in a matter of this importance."—(R. 288).

"Without going into the details, I reported to the Governor that an injunction had been issued according to reports that I had enjoining the Railroad Commission from enforcement of its order and enjoining me from enforcing their order. I stated to the Governor that if these wells were permitted to be opened at the rate of 5,000 barrels, there would be serious trouble, the adjoining operators and land owners as well would seek to take charge of them to stop it. He directed me then over the telephone to not permit the wells to run at more than 165 barrels, to cease following the orders of the Railroad Commission, but absolutely his orders. I told him that his orders would be complied with, but I wanted it in writing. Later in the evening his secretary telephoned me with the written order of October 13th. I sent out details and found the wells running open and shut them down."—(R. 288-289).

"I wasn't violating the Court's injunction; I obeyed the Governor's injunction."—(R. 291).

"In the performance of what I conceive to be my duties in the administration of this rule in the military district, I recognize no other authority except the Governor of Texas. So far as I co-operate and have anything to do with the ordinary civil authorities, it is merely by way of getting advice or taking it or leaving it as my judgment may dictate."—(R. 202-303).

And by terms of statute General Wolters was and is a "military officer" and is not a "civil officer." Ex Parte Dailey, 246 S. W. 91. And see 26 Texas 411.

With the Trial Court in this case (R. 119; 57 Fed. 227, 237), we say the statutes relied upon by Appellants are without any such grant of power as is claimed.

But if, as and to extent that such statutory provisions, or any of them, purport the broad and unreviewable authority contended for them by Appellants, the statutes are impotent because they contravene the organic laws of Texas.

The decision of the Supreme Court of Colorado in Re Moyer, 35 Col. 159, 85 Pac. 190, 12 L.R.A. (N.S.) 979, (referred to by this Court in Moyer vs. Peabody, 212 U. S. 78), that the Governor had not there exceeded his authority was predicated upon lack of 'expressed or implied' limitations upon adoption of means to carry into effect the expressly granted powers "to suppress insurrection." If therefore it be true (and we claim it is true) that the Texas Constitution includes restrictions as to "means" which may be taken in execution of the (supposed) general authority vested in the Governor, then the whole series of cases from Colorado and other jurisdictions relied upon by Appellants become wholly unavailing.

Presently, we shall attempt to point out such restrictions; but before doing so we again call attention to the fact that Texas law, as announced by

Texas courts acting under a constitution much less stringent than the present one in respect of expressed limitations of official power, permits judicial inquiry about "necessity," vel non, of use of asserted power. Ex Parte Coupland, 26 Texas 387; Ex Parte Turman, 26 Texas 708; Ex Parte Mayer, 27 Texas 715, 719; State vs. Sparks and Magruder, 27 Texas 627, 705; Emancipation Cases, 31 Texas 504; Manley vs. State, 137 S. W. 1137, 1141; Manley vs. State, 154 S. W. 1008. In the views of at least two of the three) judges, as expressed in Ex Parte Coupland, such a thing as valid "martial law" upon Executive action is wholly foreign to our system. And in a comparatively late case by a Court of Civil Appeals (Rose Mfg. Co. vs. W. U. Tel. Co., 251 S. W. 337, 339) it was said that "military power can only be exercised over the property of the citizen," if at all, "when the civil arm of the government becomes powerless"; "military powers over the citizen and his property are based upon and limited by necessity,—whenever this necessity ceases, such military power must end." In that case writ of error was refused by the Supreme Court.

B. RELEVANT CONSTITUTIONAL PROVISIONS

Such "powers of government" as are delegated at all (which, as already pointed out, are much less than the whole) are by terms of Article II, of the

Constitution of Texas, generally apportioned as between Departments; and by terms of Article IV such executive powers as are delegated are further generally apportioned as between different branches of the Executive Department. By other provisions of the Constitution executive powers are vested (or required to be vested by the Legislature) in officers to whom no reference is made in Art. IV, such, e. g., as sheriffs and other officers of counties.

Thus it will be seen: (a) That by existence and effect of Art. I of the Constitution only a part of executive authority is allowed to be vested in all offers combined; and, (b), that *but a part* of that part delegated at all is vested in the Governor. And nowhere in the constitution will there be found attempted expressed or implied grants of a supreme executive authority, and in this respect at least, our constitution differs widely from the texts of the constitutions of Colorado, Idaho, Indiana, Kentucky, Montana, Nebraska, Pennsylvania, West Virginia, etc., as will be pointed out in some detail presently. The general text and structure of our constitution negatives all ground for thought of existence of such a power and particular terms of the instrument, if given their plain meaning, deny its existence with a force which ought not be thwarted or rightly be given a circumscribed range.

And, *first*, we notice the affirmative grants upon

which the adversary must rely.

In Sec. 10 of Art. IV it is provided that the Governor "shall cause the laws to be faithfully executed." In Sec. 7 of the same Article it is provided that the Governor "shall have power to call forth the militia to execute the laws of the State." So far, of course, there is and can be no shadow of excuse for the pretense that he can interfere with operation of municipal law, at least in its substantive aspects. For, as was said of the President (with like grants of authority) in Ex Parte Milligan, the Governor "is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws." Manifestly, authority to fiat what the citizen shall do with his property, to what uses he shall put it, or to what extent his proprietorship shall be yielded or suspended cannot be deduced from the language of the grants just mentioned; and there is even less ground in these grants for the claim of authority to set judicial process at naught and to heap upon established and operating courts the contumely of unconcealed and defiant contempt. The authority claimed must proceed from a different source, if for it there be warrant at all.

It is claimed, we assume, that such warrant inheres in that language of Sec. 7 of Art. IV, wherein it is said that the Governor "shall have power to call forth the militia * * * to suppress insurrection." But,

it will at once be noticed, there is not here any expressed grant of authority to suspend or otherwise interfere with municipal law in or in connection with use of the militia to "suppress insurrection." In order to predicate that power on this term of the constitution at all, resort must be had to implication. The implication which is essential to justify present and threatened attempts to use that power does not, however, arise, and this, we think, is demonstrable.

In the first place, the implication (viewed and given application to existent facts) would not exist, even if this particular grant stood alone and unaffected by other provisions which may operate to restrict it. This is true because, on the undisputed facts, the courts are open; there is not an actual state of war or of insurrection, at most there is but attack or feint of harpies of Imagination suggesting *possibility* of violence. We repeat what has already been said: This (except for some contemporaneous swashbuckling in a neighboring State) is the first instance in American history that active exponents of "martial law" have not had for asserted justification an apparent condition of violence in fact (or an expressed authorization). And, it follows, that there is not in the books any precedent (favorable to our adversaries) relevant to the question now up, which is this: Does there inhere in an expressed grant of authority to use the militia to suppress insurrection

an implied power to use the militia in suspension or impairment of vested individual and public rights when no insurrection, in fact, exists? Given more specific application: May a Governor thus justify subordinates in suspending and impairing such rights? The answer to this question (along with the complete answer to most military usurpation) is to be found at any one of several places in Ex Parte Milligan and, particularly, in this language:

> "Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."

And doubly-assured answer is to be found in the unbending requirement of the Fourteenth Amendment (and in comparable terms in the Texas constitution) that power, actually vested, shall not be used capriciously and arbitrarily.

But the affirmative grant does not stand alone and unaffected (if it be given the wide range asserted by our opponents) by terms of superior force. All possibility of the words of the affirmative grant carrying along with them an implied power such as is claimed is cut off beyond resurrection or redemption by terms and prohibitions used by true sovereignty in carving exceptions "from the general powers of government."

In Section 24 of the Bill of Rights (Art. I, Const. of Texas) it is plainly said that "the military shall at all times be subordinate to the civil authority," and, as remarked, the power to make the "civil authority" subordinate to "the military" is, by force of this Section and Section 29, "excepted" from the "general powers of government." The prohibition is plainly expressed, in it there is no slightest ambiguity, no variableness, no shadow of turning. It is not that this subordination shall be incomplete or exist only at permitted times; it is that "the military" shall be "subordinate to the civil authority" at "all times." And since the provision was made, since its meaning is clear, since it is excepted from the "general powers of government," what officer of the government, it may be inquired, has warrant to supersede its imperative demand? What appears to us to be the unmistakable effect of Sec. 24 of the Bill of Rights in relation to Sec. 7 of Art. IV is that use of the militia "to suppress insurrection," in order to be lawful, must be in subordination to the "civil authority." The books do not contain a Texas case intimating a different interpretation; and every reported Texas case, in anywise bearing upon the matter, supports the proposition just made. The opposing argument, applicable anywhere, pays no respect to logic and, as applicable in Texas, completely ignores constitutional barriers not existent in those States whence it proceeds. That argument is this:

The Governor is a "civil authority;" he commands the militia; hence, use of the militia (whatever the use may be) is use of it by or in subordination to "civil authority." But "martial law," obviously, and essentially, is military force, a force which operates the "will of the commander" and sets at naught opposing rights and privileges secured in the common law and in statutes and constitutions and, even, as finally established by judgment of Courts of ample jurisdiction. The silly deceit which characterizes an argument that such a force is, at last, but exertion of "civil authority" is given emphasis by Counsel's admission (for purposes of the argument) that Appellees here have "the constitutional right to produce oil (without physical waste) to the capacity limits of their wells" and their view, immediately re-urged, that during the period of Martial Law the right is suspended.

If that which is plain may yet be clarified, the admission and contention to which reference has just been made demonstrates that which in reality, needs no demonstration, i. e., "Martial Law" does not and cannot exist save in and by way of suspension of municipal law. This, in turn, leads to further and indubitable proof that Martial Law (at least in virtue alone of executive action) cannot rightfully exist in Texas. And this will develop another phase in which our constitution differs widely from the con-

stitutions of those States whose jurisprudence has been called to the aid of Appellants here. The power (or specific denial of power) to which we now refer is that which is the subject of Section 28 of the Bill of Rights (i. e., Art. 1, Const. of Texas) whose language is:

> "No power of suspending laws in this State shall be exercised, except by the legislature."

And by Section 29 (Art. I) the authority of any officer or body (except the Legislature) to suspend laws is "excepted out of the powers of government." Here is a plainly and specifically expressed inhibitian of suspension of laws by any officer or body save the Legislature. How, then, may the Governor and his subordinates lawfully work that "suspension of laws" which is indispensible to existence of Martial Rule? As a matter of course, that cannot be done if the terms of Sections 28 and 29 of the Bill of Rights be given their obvious meaning. And there is naught in other provisions of the Constitution to imply (much less, to express) a different meaning for the words of Section 28 and 29. The effect of other relevant provisions, it seems plain, is corroborative rather than contradictory or restrictive of the literalism of Section 28 of Article I.

By terms of Section 1, of Article III, e. g., "the legislative power" is vested "in a senate and house of representatives" and in terms of Article II there is

expressed prohibition of use of such power by any other "person or collection of persons" except "in the instances * * * EXPRESSLY permitted." The effect of Section 1 of Article III and of Article II, manifestly, is that of a specific denial of legislative authority in executive or judicial officials except and unless such power (in particular instances) be given in EXPRESSED terms. This is tantamount to declared refutation of any and all claims by executive, etc., officers of right to use legislative authority where the claims are predicated in IMPLICATION. Inferences are without force in this respect, for the People (who are the State) have said that their servants (not of the "senate and house of representatives") who attempt to use legislative authority must be able to point to "expressed constitutional permission" in order to defend against a charge of flagrant usurpation. As stated already, there is not to be found in the constitution any expressed grant (to the Governor) of authority to declare Martial Rule or thereby to justify accomplishment of any of the things which are characteristic of Martial Rule. Words appropriate to expression of such a grant are not in Section 7 of Article IV, upon which Defendants rely; the authority there given is merely to use the militia "to suppress insurrection;" the terms used in making the grant are easily subject to the meaning that insurrection is to be suppressed by methods or means provided for by valid municipal

law and without interfering with rights secured by that law; hence, there is not in Section 7 of Article IV "expressed permission" for the Governor to exercise legislative authority. The declaration of Martial Rule is, in its essence, the exercise of legislative power; this is true, necessarily, because there is (in the period of Martial Rule) suspension of municipal law in whole or in substantial part. That truth has recognition in all of the cases, (as well as in treatises) having relation to the subject, e. g. Luther vs. Borden, 7 How. 1, 10-11, 34, 45, 12 L. Ed. 581, and Ex Parte Couplant, 26 Texas 387, 433, 435.

As plainly as *declaration* of Martial Rule is use of the legislative function, *sustenance* of Martial Rule includes exercise (by executives) of legislative power. For, obviously, expressions of the "will of the commander" declare whether or not rights and privileges bottomed in and vouchsafed by civil law may yet be enjoyed, and whether or not the remedies provided in municipal law may yet be pursued. Adjectively and substantively, the "will of the commander" replaces municipal law.

Hence, and because declaration and/or sustenance of Martial Rule is exercise by the Governor and/or his subordinantes of legislative power and because such authority is not "expressly permitted," it results that Martial Rule (on executive authority) is forbidden by conjoint effect of Article II and Section

1 of Article III of the constitution of Texas. Otherwise stated, Section 1 of Article III, taken with Article II, express (or obviously imply) the meaning emphatically declared in Section 28 of Article I, i. e., "No power of suspending laws in this State shall be exercised, except by the Legislature." A remark (in Ex Parte Milligan) concerning the martial-minded and touching authority of the Chief Executive is worthy of constant iteration: "They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws," and the views of the Judiciary Committee of the Confederate Congress (approved by Chief Justice Wheeler and Justice Bell and not in anywise disputed by Justice Moore in Ex Parte Coupland, 26 Texas 387, 406-8, 430-436) have appropriate relation here:

> "In whatever sense martial law may be declared, the power to declare or authorize it seems to belong exclusively to the legislature, whether of a state or of the Confederate States; if martial law over the people be necessary in any case, it should be regulated and defined in a sense consistent with the constitution *by distinct enactments.*"

There are in the text of the constitution yet other terms whose existence and meaning preclude legality in executively ordained Martial Rule.

"The judicial power of this State" is by Article V of the constitution vested in named courts. The Governor and/or his subordinates and military men do not appear in the list of those in whom is vested "judicial power." Nor is there in the constitution any relevant term "expressly permitting" the Governor and/or his subordinates to use "judicial power." In necessary consequence, such use of "judicial power" is forbidden in expressed terms of Article II. Yet if Martial Rule be lawful, its satellites may erect themselves into courts, displacing regularly constituted authority, and try out questions of property, liberty and even of life and death. The record here affords examples of actual use of that authority; and the basis of the justification offered supports its use in its maximum sweep. "Congress could grant no such authority," it was said in Ex Parte Milligan; all of the reasons which required that declaration as to the power of Congress exist to support a like statement as to lack of authority to delegate judicial power to any Texas non-judicial officer, and, in addition, there is in the expressed terms of Article II definite prohibition of use of such power by executive officers.

Necessarily, too, assumption of judicial power by Executives works suspension of laws providing for courts and judicial remedies and, thus, violates those provisions of the constitution of Texas: (*a*) Whereby "the legislative power of this State" is vested in

the Senate and House (Sec. 1, Art. III); (*b*) whereby an executive is prohibited the use of authority "properly attached" to the Legislature; (*c*) wherein there is expressed prohibition of "power of suspending laws * * * except by the legislature" (Sec. 28, Art. I).

In the constitutions of Texas prior to the instant one it was provided that laws should not be suspended except by the Legislature *or under its authority.* In 1870 the Legislature enacted a staute which, amongst other things, authorized (in terms) the Governor to establish "martial law" and, thus, to suspend municipal law. As pointed out in some detail on pages_____herein below, enactment of that statute and doings had under it provoked such tumult and such manifestations of outraged feeling as to cause repeal of the statute and such amending of the constitution as to omit the words authorizing suspension of laws under authority of the Legislature. So much is authoritatively stated by the Court of Criminal Appeals (the highest court of the State in criminal matters) in Arroyo vs. State, 69 S. W. 504.

And the unqualified terms of the constitution respecting Habeas Corpus are tantamount to expressed declaration against lawful Martial Rule.

In Section 12 of Article I (Const. of Texas) it is said: "The writ of Habeas corpus is a writ of

right, and shall never be suspended. The legislature shall enact laws to render the remedy speedy and effectual." Power to issue "writs of habeas corpus" is vested in the Supreme Court and justices thereof (Sec. 3, Art. V), in the Court of Criminal Appeals and justices thereof (Sec. 5, Id.), in the District Courts and judges thereof (Sec. 8, Id.) and in the County Courts and judges (Sec. 16, Id.) The writ thus provided for is *habeas corpus ad subjiciendum*, and its effect is to put the applicant under the authority and direction of the court issuing it and (during its pendency) to take the applicant from control of his captor, even though the captor be a military officer in command of troops during actual state of war. State vs. Sparks, 27 Texas 705, 707-709. And see, Ex Parte Bollman, 4 Cranch 74; Ex-Parte Milligan, 4 Wall. 2. We repeat what has been said in another connection: That Martial Rule and unsuspended writs of Habeas Corpus do not co-exist is manifest. Ex Parte Field, 5 Blachf. 63. The necessity of halting *habeas corpus* process in order that Martial Rule may be efficacious is the theme of (or has recognition in) most of the cases to which Appellants refer; and yet they are confronted with a term of Fundamental Law emphatically and unequivocally to the point that the *"writ of habeas corpus * * * shall never be suspended!"* Even in those jurisdictions whose constitutions allow the writ of habeas corpus (or its privileges) to be suspended on

happening of named contingencies "it has been the settled law" (as stated by the Supreme Court of Montana in Ex Parte McDonald, 49 Mont. 454, 143 Pac. 947, L. R. A. 1915B 988, 933) "ever since 1807 that suspension of the writ of habeas corpus is a legislative, and not an executive, function" (Ex Parte Bollman, 4 Cranch 75, 2 L. Ed. 554; Ex Parte Merryman, Taney, 246, Fed. Cos. No. 9487; Ex Parte Milligan, 4 Wall. 2, 18 L. Ed. 281; Johnson vs. Duncan 3 Mart., La., 530, 6 Am. Dec. 675; Ex Parte Benedict, Fed. Cas. No. 1292; McCall vs. McDowell, 1 Abb., U. S., 212, Fed. Cos. No. 8673; Re Kemp, 16 Wis. 360; Ex Parte Moore, 64 N. C. 807);" hence, and as declared by the Montana Court, "if the power to suspend that writ must stand or fall with the power to establish absolute martial law" (i. e., the power claimed by Appellants here), "the inference is inevitable that no such *regime* can be established by the executive." In a jurisdiction (such as Texas) whose fundamental law does not include provision allowing the writ to be suspended on occasion, but whose constitution, on the contrary, in plain words expressly declares that the writ "*shall never be suspended,*" there is patent inhibition of Martial Rule or any other rule (by executive authority or otherwise) whose sustenance, in whole or part, depends on inefficacy of Habeas Corpus.

So far, we have viewed the relevant text and struc-

ture of our constitution upon the words alone and their obvious literal meaning. In that view, we summarize:

(*a*). There is naught in the constitution upon which to base claim of existence of a "supreme executive authority," or such authority as has been used.

(*b*). Certain things are, by will of true Sovereignty, set beyond the power of *all* officers in confederation, to-wit: Subordination, at any time, of civil to military authority; suspension, at any time, of *habeas corpus*, declared, at all times, to be *a writ of* right. Such is the plainly expressed meaning of Sections 12, 24 and 29 of the Bill of Rights (Art. I, Const. of Texas).

(*c*). Certain powers, to-wit: Authority to suspend laws, in-so-far-as delegated at all, are by will of true Sovereignty, specifically vested in the Legislature (Sec. 28, Art. I and Sec. I, Art. III, Const. of Texas). That particular vesting, of itself, implies negation of rightful use of the authority by any other officer or group. But the negative, which otherwise would be implied, is thrice affirmatively declared, once in Section 28 of Art. I, once in Sec. 29 of Art. I and, again, in Art. II.

(*d*). Certain power, to-wit: "The judicial power," in-so-far as delegated at all, is vested in named

courts by words and effect of Art. V (Const. of Texas); use of that power by any other officer or group is prohibited, *first*, by its mere placement in the courts and, *second*, by terms of Art. II.

(*e*). Confessedly, Martial Rule, of the kind and with the scope claimed by Appellants, is not (legally) possible if the constitutional terms refered to be given their obvious meaning. Yet *expressed* warrant for ascribing to them (at any time) a different meaning is not to be found in other terms of the consituation; claim of such a warrant is based on implication. Basis for the implication (necessary to Appellants' claim) is precluded: *First*, by lack of that ambiguity which is essential to need for interpretation or (what is the same thing) allowance of implication. There is naught to construe. Expression and implication do not co-exist; the former precludes the latter. When a thing is declared there is an end to speculation. *Expressum facit cessare tactum.* (Swift Co. vs. United States, 101 U. S. 691, 695; U. S. vs. Graham, 110 U. S. 219, 221; U. S. vs. Tanner, 147 U. S. 663; Fairbanks vs. U. S., 181, U. S. 283, 311; U. S. vs. Finnell, 185 U. S. 236; Houghton vs. Payne, 194 U. S. 88, 99-100; G. H. & S. A. Ry. Co. vs. State, 81 Texas 572, 602, 17 S. W. 67; Fire Ass'n. vs. Love, 101 Texas 376, 108 S. W. 810; Judkins vs. Robinson, 109 Texas 6, 160 S. W. 955). Sec. 7 of Art IV (Const. of Texas), upon which Appellants must rely

for the necessary "implication," merely authorizes the Governor "to call forth the militia to execute the laws of the state, to suppress insurrection," etc. Other provisions clearly say that the writ of *habeas corpus* shall never be suspended by the Governor or anybody else, that the Governor (or anybody, save the Legislature) shall never suspend municipal law, that the Governor (or anybody, save the Legislature) shall not use legislative power except in instances *expressly permitted* (no such permission being claimed here) and that the military power shall at all times be subordinate to the regularly constituted civil authorities. Hence, there is no ambiguity upon which to predicate a challenge of this proposition: The militia, when called forth as provided for in Sec. 7 of Art. IV, shall be so used as that thereby there shall not be suspension of municipal law or other exercise of legislative power, no suspension of *habeas corpus* and (generally) no exaltation of the military over the civil authority. *Second*, By the manifest fact that the "implication" demanded, if allowed, would destroy (in whole or substantial part) plainly expressed meaning or terms of Sections 12, 24, 28 and 29, Art. I, and Sec. 1 of Art. II. The case of In Re Moyer, 35 Col. 159, 85 Pac. 190, 12 L. R. A. (N. S.) 979, see, also, 148 Fed. 870, 212 U. S. 78, upon which Appellants greatly reply is founded, in the main, upon the rule stated in 1 Story, Const. Sec. 434, to effect that an *expressed*

grant of authority carries with it authority to use the means necessary to exercise of the power expressly granted. But the rule has its limitations, stated and recognized as sound by Judge Story and by the Colorado Court: No authority can be implied where its use is in anyway "expressly or impliedly prohibited." The Colorado constitution did not have a provision expressly prohibiting suspension of laws and did have a provision allowing privileges of the writ of *habeas corpus* to be suspended when the public safety (account of insurrection, etc.) might require and did have a provision vesting in the Governor "the supreme executive power of the state." The effect of that decision (in Re Moyer) is that the Colorado law did not expressly or impliedly prohibit use of the powers assumed by the Governor and, hence, that he lawfully assumed those powers in performance of the duty *expressly* declared. Read with the state of the Colorado law in mind, the decision implies that the result would have been the exact reverse of what it was if the Colorado constitution had been like that of Texas; in any event there is in the decision naught of support for Appellants' claims because Texas has a constitution such as has been described and, in all relevant parts, materially different from that which bound the Colorado court. *Third*, by that term of Art. II which prohibits use (by an Executive) of legislative authority except when "*expressly permitted*" and by absence of such

"expressed permission."

As suggested we would do, we have considered relevant terms of the Texas Constitution upon their words and arrangement alone. So taken, the plainly *apparent* meaning negatives possibility of lawful "Martial Rule" or of any ,'Rule" whose institution and/or maintenance (by the Executive or by the Legislature or by all officers combined) so operates as to suspend the writ of habeas corpus or its privileges, or to make the military superior to civil authority. Such *apparent* meaning precludes, also inauguration and maintenance by Executive action of any "Rule" whose institution and/or effect suspends municipal law or statutory or constitutional rights or interferes with jurisdiction of the courts or otherwise debases civil authority. And that such *apparent* meaning is the effect *in right intendment* is demonstrable, we believe, if (contrary to what we maintain) there is aught in the constitution's words to justify construction or aught in those words and referable extrinsics to justify any doubt whatever. A like result, too, will come from examination of such relevant Texas decisions as are in the books, to no one of which (astounding thing!) have Appellants so far made reference. To some available extrinsic testimonials and (with them) to adjudged cases we will now advance.

History, that which was general and, in varying

degree, remote and that which was local and recent, offers powerful reason for shaping the government of Texas to the exact form delineated by the terms and foregoing interpretation of the instant constitution. Affirmative evidence to the point lacking, we would yet assume relevant history (popular and juridicial) exerted its natural influence upon those who were engaged in stating fundamental law for government of free men. We do not, however, resort to assumption; for the story of Texas speaks eloquently a conscious thought of erasing all pretext for claim of absolutism and setting never-yielding restraints on delegated power. History, that which is the common heritage of Americans and that which belongs more exclusively to Texans, bespeaks an emphatic literalism for our constitution and a stern rebuke for the broad implications in which Martial Rule seeks to discover its warrant.

If conditions which presently circumstance public office in Texas were relevant, it might be well contended that our public men either know or care nothing of history and its stern lessons. Fortunately, however, we are to look upon the constitution through the eyes of those who wrote it (Cox vs. Robinson, 105 Texas 426, 150 S. W. 1149), and those men both knew and appreciated the experiences of mankind and the significance of man's efforts for assured liberty. Erudition and observation confederated to make them know that power

and liberty are unceasingly at war and that contemporaneous existence in a common orbit means *pro tanto* mutual destruction. They understood vigilance to be the nature of the one and a lethargic unsuspicion a characteristic of the other. That usurpation feeds upon itself is a lesson whose import they knew. They did not envision a metamorphized humanity resultant of the enterprise which they were launching; they knew that the sacrifices which individual liberty must endure for the common good must be defined with some precision, else they would set in motion an agency of destruction. Hence, it came about, their work (measured by their words) evidences a limitation on official power more stringent than is to be found in any document of whose terms they had knowledge. We have just reason to say that those men (authors and voters) were far above the average of mankind in intelligence and experience; but if we were to attribute to them only that which was of common knowledge before modern hysteria and its concommitants began their enervation of intelligence, we would yet make them know relevant history. From the volume of that story innumerable striking instances might well be recalled here because they so plainly teach the necessity of keeping the military at all times subordinate to civil authority and the difficulty of assuring that state as against the preverse ambitions and efforts of unworthy men mistakenly clothed with power.

English history, of course, is the first (but by no means the only) source of that knowledge which ought to be imputed to the authors of our jural being. The Common Law, whose beginning is coincident with (if, indeed, not more ancient than) the most remote of historical data, reflects instinctive repugnance to arbitrary power. Of that system Mr. Cooley (Const. Lim., 7th Ed., p. 50) justly says:

> " * * * That it recognized the worth, and sought especially to protect the rights and privileges, of the individual man. Its maxims were those of a sturdy and independent race, accustomed in an unusual degree to freedom of thought and action, and to a share in the administration of public affairs; and arbitrary power and uncontrolled authority were not recognized in its principles. * * * The system was the opposite of servile; its features implied boldness and independent self-reliance on the part of the people."

In a broad sense, it is proper to say that the struggles of Englishmen for those assurances of freedom which are embodied in each of a long-line of (so-called) constitutional documents were not, primarily, struggles for new or extended liberties at all, but were struggles against usurpers to regain and solemnly re-declare that which had been theirs of right from the beginning. Of one of the documentary "bulwarks" (perhaps, the greatest of them) Sidney has declared:

> It "was not made to restrain the absolute authority" (i. e., of the king), "for no such thing was in being pretended (the folly of such visions seeming to have been reserved to complete the misfortunes and ignominy of our age), but it was to assert the native and original liberties of our nation by the confession of the king then being, that neither he nor his successors should in any way encroach upon them." (Sidney on Government, c. 3, Sec. 27).

Before the advent of William the Conqueror (1066), it may properly be said, lack of arbitrary power in the king had been thoroughly established and was generally observed. William undertook to overthrow the laws which he found prevailing and, in the undertaking, he measurably succeeded. The lands of the conquered were, in the main, distributed to his own followers. Recognizing the manifest fact that if arbitrary power could give it could also take away, the recipients of William's bounty petitioned for restoration of the ancient baronial laws of Edward the Confessor. This petition was renewed, from time to time, to William I and, also, to William Rufus(1087-1100), but on various pretexts they were denied. But when Henry I appeared (1100) to claim the throne a 'charter" was required of him (and granted) whereby "evil customs" should be abolished and whereby most of the "privileges" subsequently named in Magna Charta were assured in a more or less definite way. In the course of the next hundred years most of the copies of that instrument disap-

peared, as did remembered knowledge of its content. It resulted that when John (with a clouded title) claimed the crown in 1199, the Barons demanded and John promised the ancient privileges. John, of course, disregarded the promise, so that at Running Mede in 1215, he was by threatened force compelled to accede (for himself and successors) to Magna Carta with its catalogue of free-men's rights.

The 29th Chapter of Magna Carta denounced (as if in so many words) the illegality of "Martial Rule" (at least in times of peace) by provision that:

> "No freeman shall be taken, or imprisoned, or disseised from his freehold, or liberties, or immunities, nor outlawed, nor exiled, nor in any manner destroyed, nor will we come upon him or send against him, except by legal judgment of his peers or the laws of the land. We will sell or deny justice to none, nor put off right or justice."

The appetite for power, however, remained as strong in English kings as it appears to be in modern Governors; and those kings broke the faith so often as that Magna Carta was, under impulsion, confirmed no less than thirty-two times between 1215 and 1416, notable amongst the instances are confirmation by Henry III in 1225 and the Confirmato Chartarum by Edward I, under the great seal, November 5, 1297.

In course of time and by various regal exponents

of absolutism attempts at thwarting of due process of law, provided for in part and forecasted in part in Magna Carta, were made, sometimes successfully and at other times in vain, and with the general results, on notable occasions, of further and firmer safeguards of the ancient rights of the people.

The arms of Lancaster and Hereford confronted Edward's forty thousand men at Boroughbridge on the Trent in 1322. The King's men won; Hereford was slain in the battle; Lancaster was taken in arms at the head of his insurgent army, tried by court-martial, sentenced and executed. Formidable actual rebellion existed; in very course of its denouement yet ere its passing was certain, the 'supreme executive" will supplanted due course of law and the "supreme executive's" military engine took rightful place of the "king's courts" to try, condemn and execute a citizen for treason. In form at least, attainder followed. But eight years later, in response to complaint of Lancaster's brother, the king confessed to Lords and Commons that the execution was but murder. Parliament reversed the attainder and declared the law of England to be and to have been:

> "1. That in time of peace nc man ought to be adjudged to death for treason or any other offense without being arraigned and held to answer," (note the requirement of due process).
>
> "2. That regularly when the king's courts

are open *it is a time of peace in judgment of law,*" (note how closely this was followed in Ex Parte Milligan), and,

"3. That no man ought to be sentenced to death, by the record of the king, without his trial *per pares.*"

(Hale's Pleas to the Crown, p. 499, 500; Hume, Vol. I, p. 159; 1 Hallam's Const. Hist., 260.)

Amongst those things which attributed to Mary I (1553-1558) the just sobriquet 'Bloody Mary" was her proclamation (1558) "that whosoever had in his possession any heretical, treasonable, or seditious books, and did not presently burn them, without reading them or showing them to any other person, should be esteemed a rebel, and without any further delay be executed by the martial law." (Tytler on Military Law, p. 50, Ch. 1, Sec. 1). The historians say that at least as many as three hundred "heretics" were murdered by forms of "martial law" and other usurped means in Mary's short and fearful reign.

The "Ship Money" disturbances and other troubles became virulent (to the martial-minded) in 1625. Sir Thomas Darnell and others "rebelled" at payment of ship-money exactions. Darnell was arrested on "special order" of the King (Charles I). Petition for *habeas corpus* having been made, the "special order" of the king (exertion of "supreme executive authority") was asserted to be a sufficient answer.

Amongst the results of the trial in Parliament was this: The Petition of Right (declaration of the rights of the people as against the king) was prepared and presented to Charles; the king's acknowledgment, then (1628) compelled, gave the document virtue of a constitution and made it, for all time, one of the bulwarks of English liberties. *Inter alia*, The Petition of Right declared unlawful (and to have been unlawful) any violation of the following named terms: First, no freeman should be imprisoned, disseised of his land, etc., etc., but by the judgment of his peers or the law of the land; *second*, that no subject should be imprisoned without cause shown, precluding mere suspicion as reason for detention; *third*, that commissions for trial of offenders by martial law ought not to issue in time of peace, there being "peace in judgment of law" (as declared in Lancaster's Case) when the "king's courts are open."

Persistence and perversity of desire for authority which seems to be inevitable result of taste of absolutism manifested itself in Charles' bad-faith efforts to resume that which he had but shortly acknowledged as being the heritage of the people. He undertook to govern without convening Parliament, raising funds by levying poundage, ship-money, etc., and compelling payment by exertion of "supreme executive authority." The breaking out of civil war

and war with the Scots compelled him, at last, to convene Parliament (1640), the session earning the title "Long Parliament" and leaving fruits sweet to the taste of those who regarded liberty under law as being of first importance. Amongst the consequences of immediate relevancy are those next mentioned.

Charles had made Thomas Wentworth, Earl of Strafford, Lord Lieutenant of Ireland, etc. Strafford caused Viscount Stormont to be tried for treason by a military commission and, upon sentence of that body, to be executed. The Long Parliament impeached Strafford for treason and as for murder of Stormont. Vain was the defense that insurrection was rife, that Stormont was a traitor and that the army would be impotent if it were compelled to seek protection by the civil courts; equally vain were kingly influence and exertions in Strafford's behalf. He was convicted of murder and treason and executed.

Laud (Archbishop of Canterbury) another of Charles' official creatures, was impeached, convicted and executed for violations (by regal sanction) of the rights of the people.

In 1641 the House of Commons passed the Grand Remonstrance setting forth in more than two hundred clauses (each voted separately) usurpations, civil and military, by the king and demanding that each illegal exaction and act be presented and (if

proved) punished at the sessions and assizes and that justices and judges should be sworn to the due execution of the Petition of Right. Taswell-Langmead, Eng. Const. Hist., 464. The document was ordered published Dec. 14, 1641. Charles replied by "impeaching" and attempting to arrest (Jan. 4, 1642) five of the Parliamentary leaders. Failing in the attempt, Charles left London. At Nottingham, Aug. 22, 1642, he raised the royal standard; at Naseby, June 16, 1645, he was defeated by Parliamentary forces under Fairfax; May 5, 1646, he delivered himself to the Scottish army at Newark; surrendered to Parliament January 30, 1647, he was tried for treason January 20-27, 1649, and, thereupon beheaded.

In the time of James II (1685-1688) rebellion fomented with (apparent) abetment of the Seven Bishops. The Prince of Orange, across the Channel, prepared to invade the Kingdom, knowing that thousands of the king's subjects so desired and would give aid upon his approach. Within a few months the rebellion did, in fact, exile James and make him an outcast. While the conspiracy was flagrant but before its overt pronouncement James claimed the right to suspend the penal laws and upon the assumption arrested the bishops, thereby expressing regal fiat that public safety (account of imminent insurrection) required the means. Here was, then, plain assumption of "supreme executive au-

thority" to find or determine the "fact" of insurrection and, thereupon, to inaugurate a sort of "Martial Rule." Yet even James, so circumstanced, did not dare hold the bishops in military duress or to have them disposed of by court-martial; they were sent to the civil courts and to a jury whose verdict of acquittal was communicated to James while on Hounslow Heath reviewing the troops which he had prepared to meet the rebellion. See 12 How. St. Trials, 183.

William (Prince of Orange) and Mary, in 1688 commenced to occupy the throne lately in possession of the expelled Stuarts (James II, et als). Violence existed and was omended everywhere and to such extent as (upon the appearances at least) to render the king's person unsafe and to threaten the kingdom itself. Within the year, it will be remembered, decisive battle had ended the reign of James II; within the next two years, it will be recalled, James II, from his asylum in France, made descents upon the kingdom, particularly Ireland. Manifestly—existence of peace, save "in judgment of law" as declared in the reversal of Lancaster's attainder (1330), was doubtful. In any view of conditions, a reasonable mind could then have made an honest "finding" of insurrection actual or threatened upon which to predicate "Martial Rule" of at least a modified scope. Yet the new king, though flush with vic-

tory, recognized the unlawful quality of Martial Rule. He went to Parliament with statement of the violent conditions, with declaration that he had no power to declare martial law or to suspend the writ of *habeas corpus* or to seize and imprison persons on suspicion of treason or intended outbreaks against the peace of the realm and with prayer for advice and assistance. The response of Parliament was by passage of the Bill of Rights (1 Wm. & Mary, Sess. 2, c. 2, 1689). William and Mary were required, as condition of their election to the throne, to accept and agree to terms of this statute, and it was only after their acceptance and agreement that their accession was proclaimed (Feb. 13, 1689). See, 2 Gneist, Hist. of Eng. Const., 316, note; 1 Bouvier, Law Dictionary, Rawle's 3rd Rev., p. 362. This document (which, with the Petition of Right, served as general pattern for American Bills of Right) declared the *illegality*: Of royal pretension (past and future) of authority to suspend laws (including the Habeas Corpus Act) or their execution "without consent of Parliament;" of raising or keeping a standing army in time of peace, without consent of Parliament, etc., etc.

Lieutenant Frye was in naval service on a British man-of-war in 1743. By his superior he was ordered to assist in arresting another officer. Frye, as condition of obedience, demanded a written order per service custom. For this he was arrested, tried by

court-martial and sentenced to be imprisoned for fifteen years. In 1746 he sued the president of the court-martial for damages and recovered. He then sued Rear Admiral Mayne and Captain Rentone, members of the court-martial that had tried him, and they were arrested (on writ from the Common Pleas) just as a court-martial (of which they were members) adjourned for the day. Thereupon other members (15) of the court-martial re-assembled and declared (by resolution) that the order for arrest of Mayne and Rentone for their official acts was an insult to the dignity of the naval service. Chief Justice Willes immediately ordered arrest of all the members of the court-martial who had signed the resolution. Upon their arrest, those officers appealed to the king who, being military-minded, evidenced indignation at the arrests. The court, however, stood firm and investigation of the case proceeded. The final results were: (*a*) Ending of the proceeding upon presentation to the court of "an humble and submissive letter of apology" withdrawing the resolution) and, (*b*), recording of the letter in the Remembrance Office "to the end," as the Chief-Justice said, "that the present and future ages may know that whosoever set themselves in opposition to the law, or think themselves above the law, will in the end find themselves mistaken." McArthur on Courts-Martial, Vol. 1, pp. 268-271; 4 Wall. 45.

Joseph Wall was governor of the British colony at Goree in Africa in 1782, and, as such, was in command of a body of troops. He believed that a mutiny was about to break; he assembled the troops, held a consultation with his officers and, thereupon, ordered one Armstrong (suspected leader of the expected mutiny) to be seized and given eight hundred lashes with a rope. Armstrong died from injuries from the lashing. Two decades later Wall faced a charge of the murder of Armstrong and made defense that he had had power of life and death in case of mutiny, that necessity of the case justified him in suspending ordinary forms of law and that, as governor and commander-in-chief at Goree, he was sole judge of the necessities. Wall was convicted and executed. 28 State Trials, Howell's Ed., p. 51; Hough's Military Law, pp. 537-540.

In the wars between England and France various operations took place along the coasts of Nova Scotia, e. g., Louisburg was taken by New England troops in 1745; recovered by the French in 1748; and besieged and taken by the English (through Admiral Boscawen et als.) in 1758. Captain Gambier of the British navy, acting under orders of Admiral Boscawen, pulled down the houses of some sutlers who were supplying liquor to seamen with consequent injury to their health. Gambier was held liable in damages for the act. See Mostyn vs. Fabrigas, 1

Cowp., 180. In Mitchell vs. Harmony, 13 Howard 115, 135, 14 L. Ed. 75, the Supreme Court of the United States made these references to the transactions and litigation and its results:

> "The motive was evidently a laudable one, and the act was done for the public service. Yet it was an invasion of the rights of private property, and without the authority of law, and the officer who executed the order was held liable to an action, and the sutlers recovered damages against him to the value of the property destroyed . . . This case shows how carefully the rights of private property are guarded by the laws in England * * *."

Nor did the American colonies escape the furies of military usurpations by minions of the British king.

In February, 1775, Parliament declared the American Colonies to be in a state of rebellion. June 12, 1775, two months after Concord and Lexington and five days before Bunker Hill, with the colonial army besieging the city and its British garrison, General Gage declared martial law in Boston. (Annual Register for 1775, pp. 133, 247, 261; 7 How. 64-65.) November 7, 1774, with war flagrant throughout the colonies, Lord Dunmore, Governor, declared martial law in Virginia. The Virginia Assembly denounced the Act and Dunmore for having assumed, as it claimed, a power which the king him-

self dared not exercise, since it "annuls the law of the land and introduces the most excrable of all systems. (Annual Register for 1775. p. 28: 4 Am. Archives 87; How. 65). Justice Woodbury (in his dissenting opinion in Luther vs. Borden, 7 How. 66) declared, with warrant of history, that these acts of General Gage and Lord Dunmore had no support in English law.

Our national life was begun with a protest against military usurpation. The attempts at martial rule made by Gage provoked such universal indigation as to produce in the Declaration of Independence a charge that the King had "affected to render the military independent of and superior to the civil power." And throughout the Revolutionary War, even in its most desperate stages, our fathers were scrupulously careful to subordinate the miliary to the civil authority. General Washington's file of orders show that in four instances were civilians tried by military courts, *and each of those trials was expressly directed by Congress.* So, the only effort at anything like martial law made during the Revolution was pursuant to resolution by Congress. The common thought and feeling of necessity that the civil authority must always be superior to the military found expression to that effect in various constitutions adopted in the period of the war, e. g., those of Delaware, Maryland, North Carolina and

Pennsylvania, adopted in 1776, of South Carolina adopted in 1778 and that of Massachusetts adopted in 1780.

That sentiment had occasion for exhibition soon after independence had been achieved. Shay's rebellion occurred in Massachusetts in 1787, before adoption of the Federal Constitution. And while the militia was used in its suppression, this was not done until after the civil courts "were obstructed and put in jeopardy" and, even then, the militia acted in execution of warrants and not military orders. (Minot's History of Shay's Insurrection, pp. 95, 101; 7 How. 77). In four counties in Pennsylvania in 1793 there was rebellion (against the United States), violent resistance of the courts and treason. A series of cases arising out of that situation are reported at pages 335-356 of 2 Dallas. Judge Peters (officiating in the courts of the United States in that territory) certified that he had issued warrants which the marshal was unable to execute without military aid, and the marshal stated that he needed such aid. (1 Am. St. Papers, 185-186; Findley's Hist., App. 181, 316, 317; 7 How. 78). It has been estimated that 6,000 men were under arms ready to oppose the United States.

Yet when troops were called they were put under orders to put themselves under direction of the marshal. Washington accompanied the troops for the

avowed purpose of seeing to it that they "should not consider themselves as judges or executioners of the laws, but as employed to support the proper authorities in the execution of them." Washington said that he had issued orders "for the subordination of the army to the laws." (Findley's History of the Western Insurrection, pp. 144, 179, 181, 187; 7 How. 79).

The Revolution, produced by exertions of arbitrary power particularly characterized by military usurpations, was accomplished, as stated and in the main, without debasement of civil authority and with all proper regard for legal rights. And, as stated, the first occasions (Shay's Insurrection in Massachusetts and Whiskey Rebellion in Pennsylvania) for use of the military after Independence was achieved witnessed careful subordination of that power to the civil authority. Yet within the space of but few years the lust for power or the reckless use of military authority exhibited their tendencies, and this exhibition for necessity of unyielding restraints characterized every national or international disturbance thereafter.

Early in 1799 there had come about (as decided in the Eliza, 4 Dallas 36) a state of "public war" as between the United States and France. Such hostilities as transpired, however, consisted largely of naval operations under the non-intercourse Acts of that year. Of the many known illegal seizures, etc.,

made by naval officers under presidential orders those dealt with in the cases of The Charming Betsy, 2 Cranch 63, 2 L. Ed. 208, and The Flying Fish, 2 Cranch 170, 2 L. Ed. 243, are typical.

"Burr's Rebellion," so-called, in its suppression manifests both the tendency to exalt the military power and a recognition that this ought not be. Troops were ordered out and persons supposed to be in the conspiracy were, under presidential orders, arrested by them. At least those who were not actually engaged in hostilities or in war-like array or in abetting those so engaged were held to be immune from such arrests. See Ex Parte Bollman and Ex Parte Swartout, 4 Cranch 74, 101, 126, 2 L. Ed. 554; 7 How. 80. General Wilkinson then, in the main, yielded obedience to the forms of the civil law, such delinquencies in that respect as occurred resulted in "a presentment against his conduct by the grand jury of New Orleans." Annual Register for 1807, pp. 84, 88; 7 How. 80-81.

General Jackson in 1814 at New Orleans suspended the functions of all civil authorities and made his will the rule of conduct for all citizens. This was done in supposed precaution against danger of outrages (such as had but shortly occurred at Badajos and St. Sebastian) by troops then marching to the attack of the city; moreover, it was done with commendation of officers of the city, judges and mem-

bers of the Legislature. The power assumed, too, was used sparingly and moderately on actual occasion. Yet, New Orleans having been saved from the British, General Jackson faced the civil court, was adjudged in contempt and paid the penalty (a fine of $1,000.00); the Supreme Court of Louisiana (in Johnson vs. Duncan, 3 Martin's La Rep., O. S. 520) declared that everything done during the siege in pursuance of martial rule, but in conflict with civil law, was void.

For its lessons and its chronological significance some French history may here have appropriate notice.

The basic purpose and measurable final result of the French Revolution (1789-1799) and yet later happenings traceable (for cause) to that conflict was to bring irresurrectible death to the monstrous tenet and pretension of the Divine Rights of kings and other epitomes and particles of arbitrary power and autocratic privilege.

Paradoxical aftermaths were a series of military despotisms thinly guised in forms of constitutional functionaries. The last of these (1799-1815) brought Napoleon to his summit, thence swiftly to Elba, thence back to power, thence again and finally to Elba. But the constitution or "charter" ordained shortly thereafter is of relevant importance in its

provision:

> "Art. The king is the supreme chief of the state! he commands the forces by sea and land; declares war; makes treaties of peace, alliance, and commerce; appoints to every office and agency of public administration; and makes rules and ordinances necessary for the execution of the laws, without the power ever of suspending them, or dispensing with their execution."
>
> "Art. The king alone sanctions and promulgates the laws."
>
> "Art. Therefore there cannot be erected commissions of extraordinary tribunals."

Louis XVIII, put on the throne by outside force upon retirement of Napoleon, ruled with some faithful regard for the "charter" provisions. But upon his death in 1824 Charles X came to the throne to prove, with his bad faith and reactionary policies, that "a Bourbon learns nothing and forgets nothing." He lasted six years. With Charles' exile (1830), came the "Citizen King" (Louis Phillipe) and a new constitution. In that document the Articles quoted above were reproduced with the words "under what name or denomination soever" added to the last. Dupin thus stated the reason for that amendment:

> "In order to prevent every possible abuse, we have added to the former text of the charter 'under what name or denomination soever', for specious names have never been wanting for

> bad things, and without this precaution the title of 'ordinary tribunal' might be conferred on the most irregular and extraordinary of courts."

Two years later formidable insurection broke in France. The king instituted martial rule in Paris by his order of June 6, 1832, declaring the city "in a state of siege" (the continental formula of martial law) founded (as declared) "on the necessity of suppressing seditious assemblages which had appeared in arms in the capital, during the days of June 5th and 6th, on attacks upon public and private property, on assassination of national guards, troops of the line, municipal guards and officers in the public service, and on the necessity of prompt and energetic measures to protect public safety against the renewal of similar attacks." June 18, 1832 the second military commission of Paris (officiating under the martial rule) declared one Geoffoy "guilty of an attack, with intent to subvert the government and to excite civil war" and sentenced him to death. Upon Geoffroy's appeal the Court of Cassation annulled the sentence with a judgment of these words:

> "Whereas Geoffroy, brought before the second military commission of the first military division, is neither in the army nor impressed with a miltary character, yet nevertheless said tribunal has implicitly declared itself to have jurisdiction and passed upon the merits, wherein it has committed an excess of power, violated the limits of its jurisdiction, and the provisions of articles 53 and 54 of the charter and those

of the laws above cited: On these grounds the court reverses and annuls the proceedings instituted against the appellant before the said commission, whatsoever has followed therefrom, and especially the judgment of condemnation of the 18th of June, instant; and in order that further proceedings be had according to law, remands him before one of the judges of instruction of the court of first instance of Paris," etc.

In Spain arbitrary power and a sort of democracy were intermittently embattled, and a phase of the struggle appeared in Mexico, in the twenty years preceding Moses Austin's appearance in Texas. By 1812 Spaniards had secured a constitution with some material restraints on monarchs; and by 1819 revolt in Mexico had become manifest in the doings of Hidalgo, Gutierres, Magee, Kempner, Aury, and Lafitte and had been crushed, but not killed.

And, of course, there had been myriad instances of military overriding of or interferences with civil authority. A tragic instance is that of the trial of Nolan's men and execution (1807) of Blackburn who threw "a four" in the dice gamble about which one of the nine should die. The survivors were tried by civil authority and their release was ordered. The commandant of the internal provinces in Mexico, however, interfered and the matter was referred to Spain; the answer was that one out of each five of the men should be executed. One having died in the

meantime, leaving nine survivors, it was possible to satisfy arbitrary caprice by the sacrifice of but one American. See Wortham, A History of Texas, Vol. I, p. 37.

Arredondo had become commandant of the eastern internal provinces (which included Texas). He was, to say the least, suspicious of Americans and gave orders to Martinez, Governor of Texas, that Americans were not to be allowed to enter Texas on any pretext whatever. So, when Moses Austin reached San Antonio in 1820 he was met promptly with Martinez's demand to quit Texas forthwith. Austin, it will be recalled, had been a Spanish subject in Louisiana and he sought to bring this to Martinez's consideration. But Arredondo's orders to the governor had been emphatic; and Martinez refused even to examine Austin's papers. Austin was sick and almost exhausted; yet he prepared to leave. Just then he met Baron de Bastrop (an old acquaintance) and disclosed his plans (of settling Texas) and his plight. Bastrop became much interested in the project and secured for Austin a stay of the order to leave until he was "better able to travel." Bastrop then espoused Austin's plans with such force that Governor Martinez and the Ayuntamiento of Texas recommended a petition to Arredondo and the provincial deputation at Monterey for permission for Austin to settle three hundred families in Texas.

Leaving Bastrop as his agent in the matter, Austin returned to Missouri. His petition was granted January 17, 1821. Moses Austin, desperately ill, arranged with his son Stephen to carry out the plan. Moses Austin died June 10, 1821. Ibid, pp. 49, 63, 64, 67. Mere accident of a former and a fortuitous renewal of a personal acquaintance, then, defeated the whim of military autocrats and servile civil functionary and preserved to mankind the genius and statesmanship of the Austins.

Stephen Austin forthwith began his efforts to carry out the project. As he approached San Antonio for the purpose of having himself officially recognized as his father's successor, he received news of the so-called "Independence" of Mexico. He proceeded to the city and on August 24, 1821, Governor Martinez signed the commission authorizing Austin to govern the colony which he would found. On that day, too, Spain, through its agent Juan O'Donoju, stipulated with Augustin de Iturbide for the independence of Mexico.

It became necessary for Austin to go to Mexico City to procure from the new government (through its congress) a confirmation of the grant made to his father. He reached Mexico City April 29, 1822. He found the "government" to consist of a regency (Iturbide, et als.) and a congress, with a struggle between the two impending.

Iturbide, plainly, was driving a personal dictatorship. Generals Bravo and Victoria and many other political leaders were imprisoned by Iturbide for opposing his designs. And on May 18, 1822, a short time after Austin's arrival, the soldiery and populace of the city proclaimed Iturbide emperor. Five months later "congress was turned out of doors by an armed force, acting under a decree of the emperor," the decree "dissolved congress and vested the legislative power * * * in a body to be known as the junto instituyente, the members of which were chosen by the emperor himself." Wortham, A History of Texas, Vol. 1, pp. 97, 104, 106-7, 108.

The "government" finally enacted a general colonization law (January 4, 1823) and Austin thereupon (February 18, 1823) secured decree granting his petition. Ibid., pp. 109, 110.

But men were speaking of Iturbide as an usurper and revolution was imminent. Austin decided to remain in Mexico City pending developments. Iturbide practically abdicated; and "congress" met March 29, 1823. On March 31 it abolished the "executive authority" which had existed under the emperor and vested "the supreme executive power" in a tribunal of three members. April 8th congress declared: Iturbide's coronation to have been an act of violence; that all things done by the "government under the emperor" were illegal and subject to revis-

ion or revocation, and that Iturbide should be banished from Mexican territory forever. But three days later congress revived the coloization law long enough to permit Austin's grant to be confirmed, thereupon the colonization law was permanently suspended. Ibid., pp. 111-114.

All relevant documents were transmitted to Garcia, Governor of Texas, on June 16, 1823, with instructions to put them into effect. Garcia appointed Baron de Bastrop as Commisisoner to organize the colony and to install Austin as legal head of it in all matters of government, and on August 9, Bastrop performed this duty. Austin thereby became authorized to administer justice in the district and to organize and to form regiment of national militia such as was required, to be the chief with the rank of Lieutenant-Colonel. Wortham, A History of Texas, pp. 134, 135.

The struggle between absolutism and republicanism was still proceding in Europe, and the so-called "Holy Aliance" (of the principal monarchies in Europe) were exerting every effort possible to restore unrestricted monarchy in France and in Spain, inclusive of Mexico, of which Texas was a part. Texas thus became a pawn of international intrigue, and but for an historical event then shortly to transpier, Texas, in all probability, would have remained subject to European control for decades. The gen-

eral situation caused the pronouncement of the Monroe Doctrine. This pronouncement and the observance of its requirements meant that Mexico, inclusive of Texas, would remain under control of Mexico or American influences, this because Spain at that time had been reduced to such state as that it could not expect to regain its lost possesisons in America.

The Mexican Congress called an election for a new "constituent congress" to represent the true will of the people and to draw up a new constitution. This congress met in November, 1823, and its membership was overwhelmingly "Republican." Upon his return trip to Texas, Austin stopped in Monterey in May, 1823, and while there, he prepared a condensation of the principles of the constitution of the United States and submitted it in the form of a "plan" to Arispe, a political leader. Arispe became chairman of the committee appointed by Congress to draw up the ACTA CONSTITUTIVA, i. e., the provisional constitution, and this instrument, when drawn (as well as the "Federal Constitution") contained much of the substance of the "plan" which Austin had prepared. The Acta Constitutiva became effective January 31, 1824, and on May 7, 1824, Congress enacted an organic statute whereby Texas and Cohuila were erected into the "State of Coahuila and Texas," it being provided that Texas should become a separate state as soon as it "pos-

sessed the necessary elements."

The Federal constitution, displacing the Acta Constitutiva, became effective October 4, 1824, and amongst its notable features were the following (1 Gammel's Laws of Texas, pp. 72-93):

> "The supreme power of the Federation as to *its exercise*, is divided into the Legislative, Executive and Judicial powers" (Art. 6).
>
> "The supreme Executive power is entrusted to a single individual, who shall be styled President of the United Mexican States" (Art. 74). Amongst the "attributes of the President" were the following: To make regulations, decrees, and orders for the better observance of the constitution and general laws; to execute the laws and decrees; to dispose of the army and navy and active militia for the internal security and external defence of the nation (Art. 110). Amongst the "restrictions of his powers" were declarations that he "cannot deprive anyone of his liberty, nor impose any punishment," it being provided, however, that "when the welfare and security of the union requires" he might arrest persons, but in such event, he was required to place such persons "within forty-eight hours, at the disposition of the competent tribunals" (Section II, Art. 110). The President, in the conduct of his office was also subjected to surveillance by the "council of the Government" hereinbelow mentioned.
>
> "The Legislative power of the nation is confided to a general Congress" (Art. 7). Amongst

the powers given Congress were these: "To preserve the Federal union of the States, and peace and public order in the interior of the Confederation" (Section II, Art. 39) and "to dictate all laws and decrees which may conduce to accomplish such purpose" (Section XXX, Art. 50).

"During the recess of Congress there shall be a Council of Government composed of half the Senate, one from each state" (Art. 113) amongst whose "attributes" were "to watch over over the observance of the constitution * * * and general laws," "to make such observations to the President as they may deem useful to the accomplishment of the constitution and laws of the Union" and to "give their consent for using the local militia" (Art. 116).

In general it was provided that "Congress alone has the power to interpret the constitution in doubtful cases" (Art. 165).

"The Government of each state be divided into three powers; viz,: The Legislative, Executive, and Judicial, and two or more of these can never be united in the same person or corporation" (Art. 157).

In 1827 the constitution of the State of Coahuila and Texas became effective (1 Gammel's Laws, pp. 423-453.) Amongst its provisions were the following:

"The supreme power of the State shall be divided *for its exercise* into Legislative, Executive, and Judicial and neither of these three powers, or any two of the same, shall ever be

united in one corporation or person, nor shall the Legislative be deposited in one individual alone." (Art. 29). "The officers of the Government clothed with any kind of authority are mere Agents or Delegates of the States." (Art. 27).

"The Executive power shall reside in a citizen, to be styled the Governor of the State." (Art. 31). Amongst the "attributes of the Governor" were the following: "To take care that the internal order and tranquility of the State be preserved, and its safety without—for both objects disposing of the militia of the State." (Art. 110). Upon the power of the Governor there was made the following restrictions: He was not "to deprive anyone of his liberty or impose punishment upon him, but when the well-being and safety of the State require the arrest of any person, he may effect it on condition of putting the person arrested, within forty-eight hours, at the disposal of a competent tribunal or judge." (Art. 110). Exercise of Executive power was made subject to notice, etc., by the "permanent duputation" and by "Executive Council" mentioned below.

"The exercise of the Legislative power shall reside in a Congress composed of deputies chosen by the people." (Art. 30). To the Congress was given the power to 'regulate the services of the militia.' (Art. 213).

Before closing an "ordinary session" Congress was required to select from its own body "a permanent deputation composed of three members" (Art. 88) and it was made the duty of the deputation "to watch over the observance of the * * * constitution and general laws * * *

to give notice to Congress of the violations it may have noticed (Art. 98).

General restrictions against any and all governmental power were provided as follows: "Every man who resides within the limits of the state, although but transiently, shall enjoy the imprescriptible rights of liberty, security, property and equality," these being declared to be the "universal rights of men" (Art. 11)! "the confiscation of property shall forever be prohibited, and even the seizure thereof can only be effected on proceeding in crimes involving a pecuniary responsibility, and only in proportion thereto" (Art. 189)! "no authority of the State can issue a mandate for searching the houses, papers, and other effects of the inhabitants thereof, except in those cases, and in the form, the laws provide" (Art. 191).

The Mexican constitution, it will be observed, left but a restricted field for unbridled power. Mere words, however solemnly pronounced, are non-lethal and their darts fall blunted against the brassy shields of Power's lusts. The truth of this has exemplification in happenings immediately and remotely subsequent.

The year 1828 brought an election in Mexico at which Don Manual Gomez Pedraza received a majority of the votes of the state legislatures; and he was declared elected. Scarcely had the result of the election been announcd when one Antonio Lopez de Santa Anna pronounced the election illegal, denounced Pedraza as a secret enemy of his country,

and with a force of troops under his command stormed and captured the fortress at Perote. Santa Anna proposed, with the aid of the army, to compel the legislatures which voted for Pedraza to rescind their action and to have Guerrero declared president. He also demanded the passage of a law banishing all Spaniards from the country. Congress immediately declared Santa Anna to be an outlaw and dispatched a military force to effect his capture. Santa Anna, however, withdrew to Oaxaca and stayed in hiding for some weeks. November 30th a portion of Guerrero's forces seized a prison building in Mexico City, made it into a fortress, and therefrom obtained complete control of the City. Thus Pedraza was compelled to resign and renounce all claims to the presidency. And the same Congress which within a few months had declared Santa Anna an outlaw, procliamed his favorite, Guerrero, to be the duly elected president of the Republic. Thus the influence of the military in Mexican affairs and its power to elevate to the presidency a man who had been defeated by legal votes was established.

In July, 1829, Spain landed a force near Tampico under the command of General Isidro Barradas with proclamation calling upon the people of Mexico to rally to the support of their King. Barradas having taken the then deserted city of Tampico, great excitement prevailed and Congress (August 25) in-

vested President Guerrero with extraordinary powers. Ibid., pp. 328-329. Two days later, Anastasio Bustamante, Vice-President of Mexico, commenced a revolution with the avowed purpose of destroying Guerrero. Bastamante's actions were accompanied with denouncement of the dictatorial powers which had been conferred on Guerrero. Santa Anna, practically alone amongst the noted leaders, undertook to defend Guerrero; he urged Guerrero to remain in the capital and to resist the movement with force. Guerrero took the field in prson, but soon found that only a few of the troops were loyal. The result was that Bustamante assumed the office of president and proceeded to organize a cabinet on January 7, 1830, and a month later Congress "recognized accomplished facts" and declared Guerrero incompetent to be president. Santa Anna thereupon announced his recogntiion of Bustamante as President, and withdrew to his estate. Ibid., pp. 336-337.

One Teran (a friend and counselor of Bustamante's) became commandant of the Eastern internal states (including Texas) a military division which had been kept up in spite of the federalization of Mexico. Teran despised all Americans and all things American, besides, on numerous occasions, he exhibited fear thereof. Also, he was a Mexican who had been educated in Europe and had freely imbibed the doctrines of the Holy Alliance and its

tenets of absolutism. In consequence, trouble in Texas was to be expected.

Teran voiced his general policy in saying that "either the Government occupies Texas now, or it is lost forever, for there can be no possibility of reconquest when our base of operations would be three-hundred leagues distant, while our enemies" (meaning the United States of America, etc.) "would be carrying on the struggle close to their base and in possession of the sea." Ibid., p. 351.

What, specifically, Teran meant was that Texas should be strongly garrisoned with Mexican troops, and the policy was carried into effect by establishing several garrisons in Texas—the troops of which in large part consisted of Mexican convicts who were compelled to do military service during their terms and thereafter to become settlers in Texas. Ibid., pp. 361, 363.

The local administration of law was in practical effect put into the hands of Teran, and a substantial effect of this was the establishment of military government in Texas, so far as government of the colonists and the collection of import duties were concerned. To the immediate consequences of this action we will return in a moment.

We pause here to call attention to the fact that in

various parts of Mexico there was much discontent, manifested in acts of violence, about the conduct of Bustamante in ousting Guerrero. With aid of the military, however, Bustamante dealt with the situation in a way that was effective, at least temporarily. His formula was a simple one: Whoever started trouble was shot and whoever was suspected was jailed. Various governors of states were deposed merely because they held to adverse political faith. The jails were full of lesser political opponents. In many of the states civil officers had become mere puppets of the military. With the constitution supposedly in effect and with broad claim of its observance, Bustamante became the head and front of a despotism as complete as anything Iturbide had conceived. So effective (in appearances) were the means employed that Bustamante was enabled on January 1, 1832, to felicitate Congress on the progress of the "government" in his administration, remarking that "the fury and animosity of political parties" has almost disappeared. Wortham, A History of Texas, Vol. II, pp. 11, 12. Nevertheless——?

January 2, 1832, the "Plan of Vera Cruz" was announced by the garrison at that place. The "Plan" is thus sumarized:

> "1. The garrison renews the obligation to faithfully observe the federal constitution and laws.

2. It asks the vice-president to dismiss the ministers whom public opinion charges with upholding centralism and tolerating abuses against civil liberty and personal rights.

"3. It appoints a committee of two officers to lay these proceedings before Santa Anna, and invite him to repair to Vera Cruz and take command of the forces.

"4. The garrison, in the event of Santa Anna's acceptance of the invitation, abstains from addressing the supreme government. The general will send this act and such other remarks as he may deem expedient to the vice-president and the authorities of the federation and states, adopting such measures besides as may conduce to the accomplishment of the desired object."

Santa Anna "accepted;" the "government" responded with arms; Fernandez, governor of Tamaulipas, Gen. Moctezuma (at Tampico), Barragan (in San Luis Potosi) and others joined the movement against Bustamante and his "ministers" and the revolt became general. In form and declared faith it was revolt against militarism. Texas, of course, was affected by the usurpations to which reference has been made generally. There were, however, specific instances of flagrant violations of our people's rights,—of those instances and their immediate results some illustrations will be given.

The fact that Guerrero was given extraordinary powers on event of the Spanish invasion in 1829 has

been mentioned. Within a very short time that act and a consequence produced indignation in Texas. This occurred because Guerrero, pursuant to such authority, promulgated an edict abolishing slavery and without making any definite provision for compensation for the losses. Meetings were held, resolutions were passed, and Austin's declaration was that the edict was in plain violation of the Federal and State constitutions; but he counselled the peaceful means of appealing for recognition of the people's constitutional rights. Austin, however, proposed that if the edict were put into effect by publication, "the ayuntamientos must then take a unanimous, firm, and constitutional stand." Wortham, A History of Texas, Vol I, pp. 331-334. These means produced the desired result, Guerrero, on December 2, 1829, notified the Governor that the department of Texas had been exempted from the general decree. Ibid. 336.

Many land titles in Texas were as yet imperfect account of the delays of the Mexican Government in taking the necessary steps for their validation and recordation. Upon petition of various settlers Francisco Madero was named as land commissioner and one Carajal as surveyor. Madero arrived in Texas in January, 1831, with his surveyor, to carry out the Governor's instructions. He organized the Municipality of Liberty and began the survey of lands.

Colonel Bradburn, an American in the military service at Anahuac, notified Teran of this action. Teran declared the action was in violation of Mexican law and ordered Madero's arrest. Bradburn, as military commander at Anahuac, arrested Madero and his surveyor and imprisoned them. He also dissolved the Municipality of Liberty and undertook to chastise those who expressed unfavorable opinion of his acts, and in that connection arrested William Barrett Travis, Patrick C. Jack, Samuel T. Allen, Monroe Edwards, and other settlers. Bradburn proposed to try these men by military tribunals, and to send them out of Texas and to the interior of Mexico. This lead to formation of a company of "volunteers" whose purpose was the rescue of the prisoners. Like abuses had taken place in the vicinity of other Mexican garrisons, and the movement against the military became rather general. Results were that the fort at Nacogdoches was stormed and taken and the garrisons at Velasco, and other places were either captured or capitulated (with the promise of leaving Texas). Those of the colonists who had joined in the movement declared in favor of Santa Anna and his supposedly "republican" program. Wortham, A History of Texas, Vol. II, pp. 8-10, 25-46. The "Turtle Bayou Resolutions," adopted by unanimous vote of those besieging Anahuac, faithfully recited grievances. Those resolutions in part read as follows:

"Those colonists of Texas have long since been convinced of the arbitrary and unconstitutional measures of the administration of Bustamante, as evinced,

"1st. By their repeated violations of the constitution and laws, and total disregard of the civil and political rights of the people.

"2nd. By their fixing and establishing among us, in the time of peace, military posts, the officers of which, totally disregarding the civil authorities of the state, have committed various acts evincing opposition to the true interests of the people in the enjoyment of civil liberty.

"3rd. By arresting the commissioners, especially Juan Francisco Madero, who, on the part of the state government, was to put the inhabitants east of the river Trinity in possession of their lands, in conformity with the laws of colonization.

"4th. By the imposition of military force, preventing the alcalde of the jurisdiction of Liberty from the exercise of his constitutional functions.

"5th. By appointing to the revenue department men whose principles are avowedly inimical to the true interests of the people of Texas; and that, too, when their character for infamy has been repeatedly established.

"6th. By the military commandant at Anahuac advising and procuring servants to quit the service of their masters, and offering them protection; causing them to labor for his benefit and refusing to compensate for the same.

"7th. By the imprisonment of our citizens

without lawful cause; and claiming the right of trying said citizens by a military court for offenses of a chracter cognizable by the civil authority alone." (Ibid., 21-23.)

What those colonists thought ought be done in precaution against repetition of the matter of the "grievances" is manifest in the "resolutions" themselves:

"*Resolved*: That we view with feelings of the deepest regret the manner in which the government of the Republic of Mexico is administered by the present dynasty. The repeated violation of the constitution; the total disregard of the laws; the entire prostration of the civil power, are grievances of such a character as to arouse the feelings of every freeman, and impel him to resistance.

"*Resolved*: That we view with feelings of the deepest interest and solititude the firm and manly resistance which is made by those patriots under the highly talented and distinguished chieftain, Santa Anna, to the numerous encroachments and infractions which have been made by the present administration upon the laws and constitution of our beloved and adopted country.

"*Resolved*: That as freemen devoted to a correct interpretation and enforcement of the constitution and laws, according to their true spirit, we pledge our lives and fortunes in support of the same, and of those distinguished leaders who are now so gallantly fighting in defense of civil liberty.

> "*Resolved*: That all the people of Texas be invited to co-operate with us, in support of the principles incorporated in the foregoing resolutions." (Ibid., pp. 22-23.)

And that the "Turtle Bayou Resolutions" expressed, in general, the thoughts and feelings of nearly all the people of Texas is evidenced by conduct and expressions of various Ayuntamientos and leaders. In John Austin's address to Col. Mexia (on occasion of his appearance in Texas to "put down" the supposed revolution) it was said:

> "Since 1830 we have been pretty much governed militarily, and in so despotic a manner that we were finally driven to arms, to restrain within their limits the military subalterns of the general government. We have not insulted the flag of our adopted country, as has been falsely stated by our enemies, but on the contrary we have defended and sustained its true dignity, and attacked those who have outraged it by using it as a pretext for their encroachments upon the constitution and sovereignty of the state of Coahuila and Texas, and as a cover for their baseness and personal crimes." (Ibid., 34).

The Ayuntamiento at San Felipe passed an "act" declaring adherence to the "Plan of Vera Cruz" and reciting, inter alia:

> "A large standing army is totally unnecessary for national defense, in the present state of friendly relations between Mexico and all foreign powers except Spain, which latter, it is well known, is too impotent to attack her; . . .

such an army is a burden to the people and consumes the revenue of the nation without any benefit; . . . it endangers the national liberty and is continually disturbing the public tranquility by affording the means of committing and defending despotic acts and producing revolutions." (Ibid., 36-37.)

At Nacogdoches the Ayuntamiento declared for Santa Anna.

"In making this move, however, the members of the Nacogdoches body confined their complaints to the local manifestations of the military and unconstitutional policy of the government. They declared that they, 'as the constituted civil authority,' had been 'overawed by the military commander of the frontiers, Colonel Jose de las Piedras, until longer forbearance would become a crime, by exposing to his unconstitutional wishes the lives, interests and peace of our fellow citizen.' " Ibid., 39.

The "revolution" in Mexico was ended by "peace terms" executed by Santa Anna and Bustamante, December 23, 1832. Under those "terms:" Pedraza was installed as President to serve until April 1, 1833; an election for President and Vice-president and members of Congress called. Ibid., 71.

Santa Anna addressed President Pedraza on the subject of Texas, saying in part:

" 'I deem it my duty to call special attention of the President to the condition of Texas. Satisfied as I am that the foreigners who have introduced themselves in that province have a

> strong tendency to declare themselves independent of the republic, and that all their remonstrances and complaints are but disguised to that end, I think it to be of paramount importance that General Filisola should forthwith proceed to fulfill his mission, having been first well supplied with good officers and the greatest number of troops possible, with instructions both to secure the integrity of our territory and do justice to the colonists. * * * '" Ibid., 72.

"The General Filisola referred to was the new commandant of the eastern internal provinces, an Italian in the Mexican service. What his 'mission' was conceived to be may be judged by the fact that on March 2, 1833, the Mexican minister of relations wrote to Butler, the American representative at Mexico City, that the North American colonists in the department of Bexar were preparing to secede from the State of Coahuila and unite themselves to the United States. He said they were being encouraged in their plans by people in the neighboring North American states, and that he hoped that the United States Government would do what it could to stop this. The president of Mexico, he added, had issued such orders as were deemed necessary to prevent the move on the part of the Texans to detach Texas from the republic. These orders, of course, were issued to Filisola, and they concerned the reoccupation of Texas. The troops which had been banished in the name of Santa Anna were to be sent back at Santa Anna's advice. Such was the program

which the Mexican government proposed to apply in dealing with the Texas situation." 'bid., pp. 72-73.

At the election provided for in the "peace terms" (of Dec. 23, 1832) Santa Anna and Gomez Farias were elected, respectively, President and Vice-President and they took office April 1, 1833. Farias was truly "republican." The Congress, elected at the same time, was radically so. Santa Anna pretended republicanism, but aimed at despotism. How the thing worked out is thus described by Wortham ("A History of Texas." Vol. II, pp. 86-89, 106, 153-155):

> "Santa Anna was deep in intrigues to have himself made the leader and beneficiary of this movement, while still posing publicly as the champion of federalism and the constitution of 1824. Indeed, he had begun to plan to this end even before he was installed as president. The new congress that had been elected following Santa Anna's triumph over Bustamante had convened on March 21, just ten days before the expiration of Pedraza's short term, and had immediately started to consider a series of the most radical "reforms" amid at the privileges of the church and the power of the army. The election had been held amid a ferment of the most extreme radicalism, and the reactionaries, hopeless of obtaining any recognition in the congress, conspired in many instances to have elected candidates from the lowest and most ignorant class in the country. It was reasoned that this was the surest way to bring about reaction. The result was a congress made up of the most rabid anti-clerical and anti-military ele-

ments of the nation. Pedraza laid down the reins of office at the very moment that the conservative and privileged classes of the country had become alarmed over the demonstrations of radicalism in congress. Sensing this situation, Santa Anna purposely absented himself from the capital and Gomez Farias had become acting president from the moment of his inauguration as vice-president.

"It was Farias, therefore, who had to deal with the extremists in congress and, incidentally, to bear the onus of their "reforms." He sought to restrain them in their wilder flights into the realm of vindictive legislation, but he was powerless. When Santa Anna finally appeared in the capital on May 16 to assume the presidential authority, the first session of the congress was nearing its close, and already the centralist party issued a document denouncing that body and its acts. Ten days later Colonel Ignacio Escalada, in the state of Michoacan issued a pronunciamento pleading himself and his followers 'to defend at all hazards the religion of Christ and the rights and privileges of the church and the army.' The pronunciamento called upon Santa Anna to assume the role of protector of those rights and privileges. Santa Anna immediately turned the office of president over to Farias again, and left the capital with a force of troops, ostensibly to put down these rebels.

"Then there occurred a farcical episode which could hardly have taken place anywhere outside of Mexico, except, perhaps, in the pages of melodramatic fiction. On June 6, Santa Anna had himself made prisoner by his own troops and proclaimed dictator. Farias apparently was left

helpless in the capital and at the mercy of the small body of troops stationed there. But if Santa Anna expected this move to succeed, he failed to appreciate the character of the man who was in the vice-president's chair. The troops in the capital attacked Farias in the palace and the later was without force of any kind to defend the government. But within a few days he had organized six thousand civilians into a voluntary army to protect the capital and then proceeded to take steps to rescue the captured president. In the face of this turn of events, Santa Anna then 'escaped' from his captors and returned to the capital. Congress, which in the meantime had been reconvened, became furious over the attempt of the army to seize the government, and passed a most drastic measure, since known as the *ley del caso*, which authorized the president to order the arrest and exile for a period of six years of the most prominent persons belonging to the party of 'religion and privileges.' Beginning with Bustamanto, the list included the outstanding reactionary leaders, dignitaries of the church and the Spanish priests. Farias atempted to dissuade the radicals against passing this measure, but without avail. The result was that reaction began to gain ground, for every one of the prescribed individuals now become an open revolutionist.

"Santa Anna had reassumed the office of president on June 18, but on July 5 he again stepped down in order to undertake a campaign against Arista and Duran, two officers who were besieging Puebla. On July 10 he left the capital with a force of twenty-four hundred men, and on the same day there was published a letter from Arista and Duran, addressed to Santa Anna, advocating the abolition of the fed-

eral system of government. This letter, which purported to be in reply to a request from Santa Anna for the views of its authors with respect to the government, proposed that Santa Anna seize the government, declare himself dictator, and that a national convention be called to give the nation any form of government other than the federal. It declared that the federal system was unsuited to Mexico. This letter was the chief topic of political discussion when Austin arrived at the capital a week after its publication. At the every moment the representative of the colonists was preparing to present to the government their petition praying that Texas be erected into a separate state under the federal system, forces were being set under way with the object of abolishing the federal system altogether." Ibid., pp. 86-89. "Santa Anna finally had a decisive battle with the followers of Arista and Duran at Guanajuato, completely routing the rebels. The intriguing president was playing a double game, however, for while apparently crushing the party of 'religion and privileges,' his real purpose was to obtain leadership of the party himself, and with its support become absolute dictator of Mexico. But this did not appear on the surface for the time being, and the outlook for peace and for constitutional government seemed bright." Ibid, p. 106.

"Santa Anna, who had been scheming for more than a year to make himself leader of the movement of 'religion and privileges,' and through its agency to become dictator of the country, decided in April, 1834, that his hour had come. He had managed to keep himself clear from the futile attempt of the radical congress to reduce the church and the army from the privileged positions in the short space of

a year, and the responsibility for that radical program was placed upon Farias. Almost from the first day congress had met a year before, reaction had set in. Throughout the year it had been growing, and in spite of Santa Anna's victory over the forces of Arista and Duran in October, it had continued to gain ground in all parts of the republic. Santa Anna had turned the affairs of the government over to Farias on December 16, 1833, and had retired to his estate on a plea of ill health. Thus, during the first year of his term as president, he managed to be absent from the capital about three-fourths of the time, serving scarcely three months in the office. He was playing a deep game; and when the situation shaped itself to his liking his health suddenly improved; he returned to the capital, and Farias stepped down for the last time.

"The immediate events which gave Santa Anna his opportunity grew out of the proclaiming of a *plan* at Ecatzingo early in February, which proposed to set up a monarchy with a descendant of Montezuma on the throne. It was a crazy movement, and was without any serious support, but it caused alarm among the members of congress. Its authors were the curate Epigemio de las Piedras and a certain Father Carlos Tepixtoc, and it contemplated nothing short of a restoration of the old dynasty of Montezuma, which the Spanish conqueror Cortes had overthrown, three centuries before. It preached a war of races and invited the Indians to take up arms and demand an equality of rights. That the members of congress should take such a movement seriously is a significant comentary on their inteligence and rabid temper. They declared that the move-

ment was the work of the clergy and so they embarked upon a program of reprisal. New drastic legislation was pased, culminating in a decree of April 10, providing that no person who participated directly in the 'arrest and assassination of Guerrero' should be permitted to belong to the Mexican army. The storm of reaction then burst over the country, and on April 24 Santa Anna again appeared in Mexico City and took over the government.

"Mexican liberals blamed Farias for not placing Santa Anna under arrest as a conspirator against his country's institutions. But the vice-president's fear of being suspected of personal ambition, and of being accused of unconstitutional acts, led him to turn over the government peaceably to the president, in spite of the fact that he was morally certain that the later's intention was to destroy the federal system. Farias left the president's chair with his hands free of 'money and blood,' and the reactionary movement, with Santa Anna at its head, had a clear road ahead. On May 23 a *plan* declaring for 'religion and privileges and Santa Anna' was proclaimed by leading centralists at Cuernavaca in the State of Morelos, and from that point forward the "*plan* of Cuernavaca" was the rallying point. It called upon Santa Anna to dissolve congress and take charge of the government, and on May 31, Santa Anna responded in vigorous fashion. He not only dissolved congress, but he dissolved the state legislatures as well, dismissed the members of Farias's cabinet with the exception of a reactionary named Lombardo, deposed governors who refused to adhere to the *plan* of Cuernavaca and even went so far as to eject from office the members of municipal ayuntaminetos who

failed to do his bidding. With the clergy and the army supporting him, Santa Anna assumed absolute power. 'Behold him,' says Bancroft, 'ruling as dictator, without congress, council, legislatures or ministers.' The whole proceding was unconstitutional but both he and his supporters pretended that the constiution of 1824 was still in effect. Some of the states resisted, but resistance was ruthlessly put down." Ibid., pp. 153-155.

See, also, Brown's "History of Texas," Vol. 1, pp. 248-250, 275-279.

April 1, 1833, (the day Santa Anna became President of Mexico) the delegates elected by the Texas colonists met in the Convention of San Felipe de Austin. 1 Gammels Laws of Texas, pp. 475-503. Among results of that Convention was a request for separate statehood, draft of a proposed constitution and appointment of Stephen F. Austin, Miller and Seguin to present the request to Mexican authorities.

Authorship of the "constitution" has been attributed to Sam Houston (then comparatively new to Texas). Its provisions, in the main, followed the more or less standard texts of American constitutions, with some ultra-democratic additions. Amongst its terms was a Bill of Rights of twenty-seven articles, the first and second articles of which read, respectively, as follows:

"All power is inherent in the people, and all

free governments are formed upon their authority, and established for their peace, safety and happiness. For the advancement of those ends, they have the inviolable right to alter, reform and abolish the government in such a manner as they may think proper."

"Government being instituted for the protection and common interest of all persons, the slavish doctrine of non-resistance against arrogant power and oppression is discarded, as destructive to the happiness of mankind, and as insulting to the rights, and subversive of the wants of the people." Ibid, p. 79.

See: Wortham, 'A History of Texas," Vol. II, pp. 78-79; Brown's "History of Texas," Vol. I, pp. 227-238.

The Petitions, resolutions, etc., of the Convention, along with the draft of a constitution, were transmitted to Mexico City. Of the three appointed to go there to urge the matter only Austin was able to go. He reached Mexico City, July 18, 1833. Wortham, "A History of Texas," Vol. II pp. 82, 85, 89. Austin's arrival was in the midst of Santa Anna's intrigues (noted above); and it was not until Dec. 7, that he received the "government's" answer to the requests, etc., framed by the Convention of San Felipe, Ibid., 109. Some of the requests were granted; that of statehood was denied. Ibid., 108-110.

In presentation of the petitions of the Convention Austin had made some vigorous statements respect-

ing Texans and their sentiments and attitude. That "independence" of or other separation from Mexico was not the object (present or remote) was made plain. But it was also made plain, in words at least, that it was "useless to try to subject or regulate Texas by military force." Ibid., 89-93. Congress had met and failed to dispose of the matters presented by the Convention of San Felipe; Austin, almost in despair, bluntly informed Vice-President Farias (President Santa Anna being away on an expedition) that "if something were not done soon to meet the situation he feared the colonists would take things in their own hands and set up a State for themselves." Farias took this to be a threat and "flew into a rage." Austin was convinced that "it was futile to expect relief from the government." Subsequently he became more optimistic and, in fact did procure a measure of relief as has been shown. But in his then mood he resolved to suggest to the colonists that they proceed to organize a state government without awaiting consent of the federal authorities. Accordingly (October 2, 1833) he wrote to the Ayuntamiento at San Antonio advising it "to take the lead in launching a state organization" and saying:

> "In the letter that I addressed you on the 14th of August, last," wrote Austin, "I expressed the opinion that the affairs of Texas would turn out favorably. Since then there have been very

few sesisons of Congress on account of cholera. The events of the civil war also have delayed all public affairs in such a way that nothing has been accomplished, and I am sorry to say that in my opinion nothing will be done, and that it is difficult to form an idea of the result of the civil war.

"In this state of affairs I recommend that all the ayuntamientos of Texas put themselves into communication with each other without delay for the purpose of organizing a local government for Texas, in the form of a state of the Mexican federation founded upon the law of May 7, 1824, and have everything ready to accomplish this in union and harmony as soon as it is known that the general congress has refused its approbation.

"This step is absolutely necessary as a preparatory measure, because there is now no doubt that the fate of Texas depends upon itself and not upon this government; nor is there any doubt that, unless the inhabitants of Texas take all its affairs into their own hands, that country is lost.

"I am firmly persuaded that the measure that I recommend is the only one that can be adopted to save us from anarchy and total ruin. This being my conviction, I hope that you will not lose a single moment in addressing a communication to all the ayuntaminetos of Texas, urging them to co-operate in the plan of organizing a local government independent of Coahuila, even though the general government should deny its consent." Ibid., 104-106.

Austin's letter (with comments by the Ayunta-

miento and others) was forwarded to Mexico City and received by the "government" there just after Austin had (on Dec. 10, 1833) commenced his return to Texas. Ibid., 114. Orders for Austin's arrest "on sight" were immediately transmitted to all military commandants; and upon his arrival at Saltillo Austin was arrested by the military commandant and informed that he would be returned to Mexico City, Ibid., 114-115.

Returned by his captors to Mexico City (Feb. 13, 1834), and without being taken before a civil tribunal, Austin was imprisoned in a dungeon of the old Inquisitions and there held *incumunicado* until May 9. After May 9th until Dec. 25th (when bail was allowed) he was kept in prison without ever being informed of the precise charge against him, but he was allowed to communicate with his friends and to receive visitors. Ibid., 112, 135-136, 149. As stated, Austin was released on bail Dec. 25, 1834; but he was not permitted to leave Mexico City until July 13, 1835, when he was finally released without trial. Ibid., 152, 303.

Austin, having endured tortures of imprisonment as a result of voicing his own and his peoples' opposition to usurpation (principally military), was yet to encounter the mailed hand ere his return home. Coming to Vera Cruz on his return Austin was not allowed to embark until after he had sought out

Santa Anna and secured from him "special permission." Ibid., 303.

Santa Anna and a Congress under his influence, having (as shown) established a despotism in guise of a republican government, moved so rapidly as that by the time Austin arrived in Texas the Governor of Coahuila and Texas had been deposed and, in fact, the entire civil government of the State had been disorganized by military decrees and force. Texas history spanning the period intervening Austin's departure for Mexico City (in 1833) and his return (in 1835) is replete with instances of military invasions of the people's rights. War came within the year. It began as a war against military despotism under claim of law; it was fought out to (what was intended to be) perpetual death to military usurpation. This conscious thought of Texans was stated in varying form in declarations of the first convention of the people after the war had begun (Wortham, A History of Texas, Vol. II, pp. 414-415):

> "Whereas, General Antonio Lopez de Santa Anna, and other military chieftains, have, by force of arms, overthrown the federal institutions of Mexico, and dissolved the social compact which existed between Texas and the other members of the Mexican confederacy; now the good people of Texas availing themselves of their natural rights,
>
> SOLEMNLY DECLARE

"1st. That they have taken up arms in defense of their rights and liberties, which were threatened by encroachments of military despots, and in defense of the republican principles of the federal constitution of Mexico, of eighteen and twenty-four.

"2d. That Texas is no longer morally or civilly bound by the compact of union; yet, stimulated by the generosity and sympathy common to a free people, they offer their support and assistance to such of the members of the Mexican confederacy as will take up arms against military despotism.

"3d. That they do not acknowledge that the present authorities of the nominal Mexican republic have the right to govern within the limits of Texas.

"4th. That they will not cease to carry on war against the said authorities whilst their troops are within the limits of Texas.

"5th. That they hold it to be their right during the disorganization of the federal system and the reign of despotism, to withdraw from the union, to establish an independent government, or to adopt such measures as they may deem best calculated to protect their rights and liberties, but that they will continue faithful to the Mexican government as long as that nation is governed by the constitution and laws that were formed for the government of the political association."

That conscious thought has much evidence in the Declaration of Independence (1 Gammel's Laws of Texas, pp. 1063-1067:

"THE UNANIMOUS DECLARATION OF INDEPENDENCE MADE BY THE DELEGATES OF THE PEOPLE OF TEXAS IN GENERAL CONVENTION AT THE TOWN OF WASHINGTON ON THE 2D DAY OF MARCH, 1836.

"When the government has ceased to protect the lives, liberty and property of the people, from whom its powers are derived, and for the advancement of whose happiness it was instituted, and so far from being a guarantee for the enjoyment of those inestimable and inalienable rights, becomes an instrument in the hands of evil rulers for their oppression: When the Federal Republican Constitution of their country, which they have sworn to support, no longer has a substantial existence, and the whole nature of their government has been forcibly changed, without their consent, from a restricted federated republic, composed of sovereign states, to a consolidated, central, military despotism, in which every interest is disregarded but that of the army and the priesthood—both the eternal enemies of liberty, the ever-ready minions of power, and the usual instruments of tyrants: When, long after the spirit of the constitution has departed, moderation is, at length, so far lost by those in power that even the semblance of freedom is removed, and the forms, themselves, of the constitution discontinued; and so far from their petitions and remonstrances being regarded the agents who bear them are thrown into dungeons; and mercenary armies sent forth to force a new government upon them at the point of the bayonet: When in consequence of such acts of malfeasance and abdication, on the part of the govern-

ment, anarchy prevails, and civil society is dissolved into its original elements. * * *

"* * * the Mexican nation has acquiesced in the late changes made in the government by General Antonio Lopez de Santa Anna, who, having overturned the constitution of his country, now offers the cruel alternative either to abandon our homes, acquired by so many privations, or submit to the most intolerable of all tyranny, the combined despotism of the sword and the priesthood.

* * *

"It has suffered the military commandants stationed among us to exercise arbitrary acts of oppression and tyranny; thus trampling upon the most sacred rights of the citizen and rendering the military superior to the civil power.

"It has dissolved by force of arms the State Congress of Coahuila and Texas, and obliged our representatives to fly for their lives from the seat of government; thus depriving us of the fundamental political right of representation.

"It has demanded the surrender of a number of our citizens, and ordered military detachments to seize and carry them into the interior for trial; in contempt of the civil authorities and in defiance of the laws and the constitution.

* * *

"It hath been, during the whole time of our connection with it, the contemptible sport and

victim of successive military revolutions, and hath continually exhibited every characteristic of weak, corrupt and tyrannical government.

"These, and other grievances, were patiently borne by the people of Texas until they reached that point at which forbearance ceased to be a virtue. We then took up arms in defense of the national constitution. We appealed to our Mexican brethren for assistance. Our appeal has been in vain. Though months have elapsed, no sympathetic response has yet been heard from the Interior. We are, therefore, forced to the melancholy conclusion that the Mexican people have acquiesced in the destruction of their liberty, and the substitution of a military government—that they are unfit to be free and are incapable of self-government.

"The necessity of self-preservation, therefore, now decrees our eternal political separation. * * *"

The Constitution of The Republic of Texas (1 Gammel's Laws of Texas, pp. 1069-1085) adopted Sept. ....., 1836, manifests intent to safe-guard liberty against official usurpation—intent to avoid military usurpation in all the phases and, especially, those aspects which had anciently and recently brought terror and suffering to our people. By Section 1, Article I, separation of powers of government was declared. "The executive authority" was vested in a President (Sec. 1, Art. III); amongst his duties was placed that of seeing "that the laws be faithfully executed" (Sec. 7, Art. VI),—there was no

declaration of authority in him to use the militia for that purpose. Legislative power was vested in a Congress of two Houses(Sec. 2, Art. I), and amongst powers given Congress was that of calling out "the militia to execute the law, to suppress insurrections and to repel invasions" (Sec. 6, Art. II), And in the "Declaration of Rights" (excepted from powers of government and "reserved to the people") it was declared:

> "Seventh. No citizen shall be deprived of privileges, outlawed, exiled, or in any manner disfranchised, except by due course of the law of the land.
>
> * * *
>
> "Tenth. * * * and the privilege of the writ of 'Habeas corpus' shall not be suspended, except in case of rebellion or invasion the public safety may require it.
>
> "Eleventh. Excessive bail shall not be required, not excessive fines imposed, or cruel or unusual punishment inflicted. All courts shall be open, and every man for any injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law.
>
> * * *
>
> "Thirteenth. No person's particular services shall be demanded, nor property taken or applied to public use, unless by the consent of himself or his representative, without just compensation being made therefor according to

law.

"Fourteenth. * * * The military shall at all times and in all cases be subordinate to the civil power. * * *"—Wortham, A History of Texas, Vol. III, 433-4.

The manifest purpose — the conscious revolt against the idea of military power—notwithstanding, the constitution then adopted included (as other constitutions have included) at least one possible defect whereon a military mind could erect a theory of rule partially (at least) beyond ordinary regimen. For by Section Tenth of the "Declaration of Rights" it was provided (at least, by implication) that the privilege of the write of *habeas corpus* might be suspended for public safety in case of rebellion or invasion. Comparable terms (or implications) were and are to be found in most of the American constitutions, including the first, second and third constitutions of the State of Texas—but for definite reasons, presently to be shown, all possibility of lawful suspension of the writ or its privileges (under any conditions) was destroyed by adoption (in 1876) of our present constitution.

Texas fought and won the war for independence and (with the constitution just described) lived free from internal usurpations but under threat of external militarism until American statehood came despite exertion of Mexican force. In conscious re-

pudiation of absolutism in all its phases—in conscious effort at death of military rule—came the rebirth of Texas as an American state, as had come its birth as an independent sovereign.

By terms of the State Constitution (adopted in 1845 and in force until in 1861 and thereafter—with some changes conformable to the constitution of the Confederate State—until Oct. 8, 1866):

a.—There was provided (in Art. I) a Bill of Rights of twenty-one sections defining rights of the people and expressly excepting those rights from scope of the powers of government delegated. Amongst provisions of the Bill of Rights were:

"Sec. 10. The privilege of the writ of habeas corpus shall not be suspended, except when in case of rebellion or invasion, the public safety may require it.

* * *

"Sec. 14. No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligations of contracts, shall be made; and no person's property shall be taken or applied to public use, without adequate compensation being made, unless by the consent of such person.

* * *

"Sec. 16. No citizen of this state shall be deprived of life, liberty, property or privileges,

outlawed, exiled, or in any manner disfranchised, except by due course of the law of the land.

"Sec. 17. The military shall at all times be subordinate to the civil authority.

"Sec. 20. No power of suspending laws in this state shall be exercised, except by the Legislature or its authority.

"Sec. 21. To guard against transgressions of the high powers herein delegated, we declare that everything in this 'Bill of Rights' is excepted out of the general powers of Government, and shall forever remain inviolate; and all laws contrary thereto, or to the following Provisions, shall be void."—2 Gammel's Laws of Texas, pp. 1278-1279.

As will be shown, Secs. 10 and 20 were (for definite reasons) materially changed in 1876.

b.—Distribution of the delegated powers of government were made as between the three Departments (Art. II) with declaration that "no person or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein *expressly permitted.*" This provision has remained without change in all subsequent constitutions.

c.—A Governor was provided for in these words (Sec. 1, Art. V):

"The supreme executive power of this State shall be vested in a Chief Magistrate, who shall be styled the Governor of the State of Texas."—2 Gammel's Laws of Texas, pp. 1287-8.

The Governor was made "Commander-in-Chief of the army and navy" (Sec. 6, Art. V); it was made his duty to "take care that the laws be faithfully executed" (Sec. 10, Art. V) and he was authorized (Sec. 4, Art. VI) "to call forth the militia to execute the laws of the State to suppress insurrections and to repel invasions." The substance of those Sections 6 and 10 of Art. V and of that Sec. 4 of Art. VI is to be found in Secs. 7 and 10, Art. IV, of the present constitution; but nothing comparable to that Sec. 1 of Art. V is to be found in the later document.

d.—Legislative and Judicial powers were (by Articles III and IV) vested, respectively, in the Legislature and in Courts substantially as is done in Articles III and V, respectively, of the present constitution.

While that Constitution was in effect cases arose and were decided by the Supreme Court of the State in which principles relevant to the present matter were recognized and/or applied. Some of those cases involved *habeas corpus* in relation to its efficacy in time of actual war *and as only partially secured* by constitutional terms allowing its privileges to be sus-

pended on occasion; others have direct relation to superiority of civil authority in other respects. And all of them demonstrate the maintained independence of that Court. Reference will now be made to those cases.

EX PARTE COUPLAND, 26 TEXAS 387:

That case was decided in 1862 by the Supreme Court composed of Chief Justice Wheeler and Justices Moore and Bell. The question directly involved was validity, or not, of the "Conscript Act" of the Confederate Congress. Coupland had been arrested by order of a provost marshal and had applied for writ of *habeas corpus;* but before the writ was served he had been enrolled as a conscript, and this was made to appear in the military officer's return to the writ. By entertaining the writ and by exercising the right to determine validity of the Conscript Act as applied to Coupland, the Court indicated its power to release the military prisoner if it had concluded his restraint was illegal. And of general matters discussed it is noticeable: (*a*)—It was held that the "State" (as represented by its officers) is not "Sovereign,"—such a State has only the powers 'conferred by the constitution' (which are less than "sovereign power"). It was said (at page 403) of the National and State governments:

> "While both possess some of the powers which are called by law writers, in distinguishing dif-

ferent forms of government, 'sovereign powers,' neither of them are themselves sovereign, but each of them represents the sovereign, and both have within their mutual spheres of action just such powers and functions as have been conferred upon them by the constitution creating them."

(*b*)—Even though it was held that Congress had been lawfully given the "war power"—power "to raise and support armies * * * to the extent that in its judgment it should deem necessary,"—and that, therefore, the "Conscription Act" was constitutional, the court held (pp. 404-405) that exercise of the power was (constitutionally) restricted to "necessity" in fact:

> "It must be borne in mind, however, that the denial of the power to raise such an army as the necessities of the government may require is a denial of the right to raise a single man. While, if the power exist, it does so only to the extent of authorizing the Confederate government to raise and support such armies as are absolutely essential to enable it to carry into effect the powers granted to it. *And though a necessity exists today, and the law is therefore constitutional, if tomorrow that necessity should cease, its continuance would be as clearly unconstitutional.*"

While "Martial Law" was not directly involved (in ExParte Coupland) Justice Bell and Chief Justice Wheeler gave the matter of its legality, etc., consideration:

"Bell, J. I concur in the correctness of the proposition that the right of a party to a writ of habeas corpus does not depend upon the legality or ilegality of his original caption and detention, but upon the legality or illegality of his original restraint at the time the writ is issued and the return made. I do not, therefore, feel at liberty to discuss the legality of the original arrest of the appellant, or the right of military comanders to place the citizens of these Confederate States under martial law. As it appears, however, from the record, that the chief justice, under the original hearing, declared that 'his mind was made up as to the constitutionality of martial law,' from which expression I understand that he meant to express his opinion that martial law, as it existed in the county of Travis at the time of the return of the writ in this case, might be declared and enforced in conformity with the constitution of the Confederate States; that it may not be supposed that I entertain a similar opinion, I take leave to say, that nothing, in my judgment, could be a more palpable violation of the constitution and of the rights of citizens. I believe that 'the constitution,' in the language of Vice President Stephens, 'was made for war as well as for peace;' and that there exists no power, in any department of the government of the Confederate States, to transcend it or to suspend it upon any motion of public necessity. I believe that no power exists anywhere in the Confederate government to subject citizens, not belonging to the army or navy, and not actually serving in the militia, to any military code, or to the will of any military officer, provost marshall or other, or to the jurisdiction of any other tribunal than the ordinary courts of justice established by law. I believe that under the con-

stitution of the Confederate States 'no person can be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger;' and that 'in all criminal prosecutions the accused has the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed.' I know that some have supposed that congress has the power to declare martial law as an incident of the power to make war. It is true that congress has the war power; but that power and all its other powers must be exercised in subordination to those provisions of the constitution which I have just quoted. But I said that I do not feel at liberty to discuss this subject. I therefore take leave of it, having said thus much only from a desire that my humble testimony, worthless as it may be, shall ever be in support of the laws and of the rights of the people, rather than in support of arbitrary power, which is destructive alike of public liberty and private right."—Pp. 406-8.

"Wheeler, C. J. I concur in the opinion delivered by Mr. Justice Moore. I express this concurrence in order that there may be no misapprehension as to my opinion as to the real question involved in the case and the grounds of the decision.

"The expression simply of my concurrence might suffice. And it might suffice to dispose of the argument upon martial law to say, there is no question of martial law properly arising for discussion in the case.

"But the observations indulged in the dissent-

ing opinion of Mr. Justice Bell concerning the bill of exceptions and martial law render it proper that I should advert briefly to my action and rulings upon the hearing, in order to prevent misapprehension as to my own opinion and rulings. And to a proper understanding of these rulings it is material to observe that the object of the proceeding upon habeas corpus is to set the complainant free from present illegal restraint. It is immaterial whether the original capition was lawful or unlawful. If at the time of the return of the writ the defendant shows a legal cause for restraint, then imposed, the prisoner will not be discharged, notwithstanding the original taking may have been without any legal authority.

"There was in this case no pretense that at the time of the return or of the service of the writ, the complainant was detained under martial law, or by any other authority than as a soldier, called into the service of the Confederate States under the act of congress known as the conscription law. Whether his original arrest and detention was legal or not was then wholly immaterial, since he had been discharged from that restraint; and the only question was, whether the return showed good cause for his then detention, he having been enrolled as a conscript; whether the law under which he was detained as a soldier was constitutional. It was my opinion that the law was constitutional; and it was upon this ground alone that I remanded him into the custody of the officer."—Pp. 30-1.

"My information from sources deemed reliable was, that congress had authorized the declaration of martial law, and that it had accordingly been declared by authority of an act

of the Confederate congress. If so, the decision of the supreme court of the United States in the case of Luther vs. Borden, 7 Howard U. S. C. 1, then before me, was a direct authority in favor of its constitutionality. In view of that decision, sanctioned by the venerated name of Chief Justice Taney, who delivered the opinion of the court, and who, it will be remembered, on a recent memorable occasion, was the first to raise his voice against the usurpation of the present federal executive in suspending the writ of habeas corpus without authority of law, and without authentic information not accessible, as to the action of congress, sitting, not as a court to pronounce an authoritative decision, but as a single judge in vacation, I did not think proper to pronounce against the authority of congress to declare or authorize the declaration of martial law. Nor do I deem the present an appropriate occasion to express a judicial opinion upon that question. It will become the province of this court to decide upon the constitutional powers of a co-ordinate department of the government when a case is presented calling for a decision. It is proper, however, to say that it now appears that the declaration of martial law in this state was not, as was at the time supposed, by authority of any act of congress; *and it is now conceded on all hands that it was unauthorized.* The only legislation it seems by congress, authorizing its declaration, was the act of the 27th of February, 1862, which provided that 'during the present invasion of the Confederate States, the president shall have power to suspend the writ of habeas corpus in such cities, towns and military districts as shall in his judgment be in such danger of attack by the enemy as to require the declaration of martial law.' As was said by the judiciary committee of the house

on a subsequent occasion, this act either assumed that the president had authority, without the aid of legislation, to declare martial law, or it was designed to confer that authority. The president so understood it, for it is well known that he proceeded to exercise the authority by declaring martial law in several places. Subsequently, in consequence of abuses, the subject elicited investigation. Congress modified its former legislation on the subject, and it is now doubtless better understood than formerly by both the civil and military authorities."—P. 433.

"Note by C. J. Wheeler. In the case of Luther V. Borden, Chief Justice Taney delivering the opinion of the court, and referring to the act of the legislature of Rhode Island declaring martial law throughout the state, holds this language: 'Unquestionably a military government established as the permanent government of the state would not be a republican government, and it would be the duty of congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crises, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the state authorities. And, unquestionably, a state may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The power is essential to the existence of every government—essential to the preservation of order and free institutions, and it is as necessary to the states of this Union as to any other government. The state itself must determine what degree of force the crisis demands, and if the government of Rhode Island

deemed the armed opposition so formidable and so ramified throughout the state as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority.'

"The court accordingly decided that under the authority of martial law an officer might lawfully arrest any one who he had reasonable grounds to believe was engaged in the insurrection, and might order a house to be forcibly entered and searched when there were reasonable grounds for supposing he might be there concealed. 7 Howard (S.C.), 45, 46.

"Such was the opinion and decision of the supreme court of the United States in a case which excited much attention at the time. That it was deliberately, and not hastily or inconsiderately decided, is manifest from the fact that Mr. Justice Woodbury delivered a most able and elaborate disenting opinion, reviewing the whole subject, and denying the constitutional power of the legislature to declare martial law.

"Judge Woodbury deduces his conclusion thus: 'The necessities of foreign war, it is conceded, sometimes impart great powers both as to things and persons. But they are modified by these necessities, and subjected to numerous regulations of national law, and justice, and humanity. These, when they exist in modern times, while allowing the persons who conduct war some necessary authority of an extraordinary character, must limit, control and make its exercise, under certain circumstances and in a certain manner, justifiable or void, with almost as much certainty and clearness as any provisions concerning municipal authority or duty. So

may it be in some extreme stages of civil war. Among these, my impression is that a state of war, whether foreign or domestic, may exist, in the great perils of which it is competent, under its rights and on principles of national law, for a comanding officer of troops under the controlling government, to extend certain rights of war, not only over its camp, but its environs and the near field of his military operations (6 American Archieves, 186), but no further or wider. Johnson vs. Davis et al. 3 Martin, 530, 531. On this rested the justification of one of the great commanders of this country and of the age, in a transaction so well known at New Orleans. Id. 83.

"I cite these because the principal judicial opinions I have met with on the subject. It is one of great moment, involving the powers of the government and the liberty of the citizen, which has no safeguard but in the supremacy of law. It is a subject, too, which the history of this country, until recently, had given but little occasion to investigate. And hence, when the occasion arose in a time of great public danger, the question was not so well understood, nor the limits of the legitimate exercise of power as well guarded, as since the unwarranted powers assumed in some instances have challenged a more thorough investigation and understanding of the subject by congress and the country. Since congress has been called upon to revise its own legislation on the subject, conceded now to have been at first not well considered, the judiciary committee of the house have made a report in which the subject has been examined and some general views presented, which appear to have been approved by congress. The committee concluded that as laws can be suspended only by the

law-making power, and as all the legislative power of the Confederate States is vested by the constitution in congress, it follows that no law can exist by the authority of the Confederate States unless it be enacted by congress. 'And in whatever sense martial law may be declared (they say), the power to declare or authorize it seems to belong exclusively to the legislature, whether of a state or of the Confederate States.' 'If martial law over the people be necessary in any case, it should be regulated and defined in a sense consistent with the constitution, by distinct enactments.' It is conceded that the necessities of war may sometimes impart extraordinary powers to military commanders. Such instances are referred to in the opinion of Mr. Justice Woodbury. But these seem to be the cases contemplated in the observations above quoted. Whenever, therefore, a case shall arise under the legislation of congress, it will become the province of the judiciary to decide whether such legislation is warranted by the grant of powers in the constitution.

"In any view, the difficulty seems to be to define what is meant by martial law. If by it is meant a power to exalt the military above the civil authority, or to supersede the latter by the former, no one would contend for such a power in any officer or department of the government; for that would be in manifest violation of the constitution, which must ever be held paramount, and in subordination to which all power must be exercised as well in war as in peace. But unless what is meant by martial law be defined in advance, it would seem difficult to pronounce either that it can or cannot constitutionally be declared or enacted. And the only

test to which any legislation which may be had on the subject can be applied is its conformity to the constitution, which of course cannot be done in advance of, or without knowing what that legislation is."—Pp. 434-6.

EX PARTE TURMAN, 26 TEXAS 708:

This case was decided at the Tyler term in 1863 by Chief Justice Wheeler and Justice Bell (Justice Roberts absent),—opinion delivered by Justice Bell. The nature of the case is shown in the following excerpt:

"Applicant petitioned for the writ of habeas corpus on the 13th day of May, 1863, alleging that he was illegally restrained of his liberty by S. M. Warner, in Smith county. Writ issued May 14, 1863. Respondent made his return to the writ on the 15th day of May, 1863, in which return he says that applicant reported to him under orders from General D. B. Martin, general enrolling officer eastern district of Texas, on the 14th day of March, 1963, and that he holds applicant only as a conscript liable to do military duty under the Confederate States conscript laws. On the 23d of January, 1863, applicant was indicted by the grand jury of Smith county, for 'knowingly, maliciously and advisedly discouraging the people from enlisting into the service of the Confederate States of America, and did then and there knowingly, maliciously and advisedly discourage the people from enlisting into the service of this state, the said State of Texas, and then and there willfully and maliciously did dispose the people to favor the enemy.' On the 14th of March, 1863, the applicant gave bond for his appearance be-

fore the district court of Smith county to answer said indictment."—P. 709.

Turman was remanded; but the duty of the military authorities to surrender him to the civil authorities for trial, if, as and when his presence weredemanded (by the District Court in exercise of its jurisdiction) is stated by the Court:

"The conscript laws have been enacted, have been held by this court to be constitutional, and are therefore to be treated as the law of the land, to which the State of Texas has given assent.

"It is held that the right of the Confederate States to compel the citizens of the states to do military service is superior to the right to the state over her militia. It follows, that if the State of Texas can require the applicant in this case to do military service as a militiaman, the Confederate States can also require him to do military service in the army of the Confederacy, in obedience to the conscript law. The state by her militia law has not exempted from service persons who are under bond to answer criminal accusations of any kind; neither does the exemption law of the Confederate States excuse such persons from service. But we are of opinion that, by necessary construction, the militia law of the state and the conscript laws must be held to operate only on persons who are enjoying the rights of citizens, and in the exercise of personal freedom. We cannot suppose that the officers appointed by the state to enroll the militia, nor the enrolling officers of the Confederate States could go into the jails and dis-

charge persons accused of crimes from custody for the purpose of placing them in the military service. And this, because such persons are in the hands of civil officers, in obedience to the mandate of the civil tribunals and of the laws, and it cannot be supposed that the state or the Confederate States intends any interference by the military with the civil authority, much less to make the civil authority which is already in action subordinate to the subsequent demand of the military authority. It may then be said that one who is under bond to appear before the civil tribunals is to a certain extent in the custody of the tribunal or of the law. This is true, and may, perhaps, further the solution of the questions involved in a case like the present. Being in the actual enjoyment of personal freedom for the time being, the party may be required by the state to render any service not inconsistent with the qualification which has been by law imposed upon the right of the party to enjoy his freedom, and not inconsistent with the policy which the state has declared by her general law for the punishment of crimes, and by the action which has been taken in the particular case. We do not doubt that if the district court were now in session in the county of Smith, the judge of the court could issue the proper writ to the military officer having the applicant in a camp of instruction within the jurisdiction of the court for trial, and it would be the duty of the military officer to obey the writ."—Pp. 712-3.

EX PARTE MAYER, 27 TEXAS 716, 719:

It will be remembered that it had been held (in Ex Parte Coupland, 26 Texas 387, discussed hereinabove) that the "war power" — power to raise

armies was vested in the Confederate Congress "to the extent that in its judgment it should deem necessary" but that use of such power is restricted to actual necessity. In Ex Parte Mayer (p. 719) it is recognized that the court may review and correct abuse in exercise of the power:

> "The power to raise armies has been exercised on grounds supposed to be proper by the party who is to judge of its propriety and necessity, and the presumption is not to be indulged that the power has been perverted, or that its exercise will be abused in a way to defeat rights secured by the constitution or reserved to the states; or, in other words, it must be a clear case of violation that will warrant the interference of the courts."—P. 719.

STATE VS. SPARKS AND MAGRUDER, 27 TEXAS 627, 27 TEXAS 705

Peebles and others were in custody of military officers on charge or suspicion of aiding or encouraging the enemy. They sued out writs of *habeas corpus* and, thereupon, were by the Supreme Court put in custody of the Sheriff of Travis county pending decision of the cases. Major Sparks (commandant of the Post at Austin), acting or claiming to act by orders of Major-General Magruder (commander of the military district of Texas, New Mexico and Arizona and who acted or claimed to act under orders of his superiors), took the prisoners from custody of the Sheriff. The opinions cited in the heading above had

to do with contempt proceedings consequent upon that military interference with jurisdiction of the court. And in terms free of equivocation the court declared the superiority of its jurisdiction and the criminal nature of infringement by military officers. Account of patriotic motives the right to punish by imprisonment was waived and nominal fine (costs) was allowed to suffice-but this, considered with the holdings made, cannot be taken as doubt of the right of a citizen (not in military service) to appeal to the courts or of the courts' power to give such relief as may be proper. We deem it appropriate to present generous excerpts from the opinions.

FROM 27 TEXAS 627:

> "The prisoners in the meantime again passed into the hands of the sheriff to abide the further action of the court. On the same day, however, and shortly after the adjournment of the court, the prisoners were forcibly wrested from him by a detachment of armed soldiers, acting under the command and in obedience to the order of the defendant, Major Sparks. Immediately upon the filing of this affidavit, writs were issued by the court to said sheriff, commanding him, without delay, to take said prisoners again into his possession, and also to attach said Sparks, and have him before the court to answer for the contempt committed against it by his wrongful and forcible infringement of its authority, in taking said prisoners out of its custody and from under its control. These writs were both duly executed, and on the next day

the defendant, Sparks, filed an answer to the attachment, in which he states, in substance, that he had received an order from Major-General Magruder, stating that he had been ordered by Lieutenant-General Smith, commanding the trans-Mississippi department, to detain as prisoners the persons referred to as in charge of the sheriff; and having previously received orders from said Major-General Magruder to place the escape of said prisoners beyond a doubt by placing a sufficient guard over them, and having once furnished a guard which was rejected by the sheriff, and being satisfied that the prisoners were not fully guarded by the sheriff, and feeling, under the orders of the officers having the right to order him, that he was held by them responsible for the safety and protection of said prisoners, and being of the opinion that they were then constructively in the possession of the military, and being ordered to disregard the then existing writ of habeas corpus, or any writ which might subsequently be issued, and having, designing and meaning no contempt of the court, but a desire to discharge his duty as an officer in obedience to orders, and having first requested the court to remand the prisoners to the military authorities through him, their then representative, and the court having declined to act on his request, but taking it under advisement until the next day, he felt it his duty to act as he had done in taking the prisoners * * *

"The fact that we have recited show that the prisoners heretofore named were in the custody of the court, acting through its ministerial officer, for their judicial action in a matter with which they are charged by the constitution and laws of the state. It certainly needs neither argument nor authority to show that there is no

officer or tribunal, civil or military, known to the law of the land, that could, without a violation of law and a contempt of this court, forcibly take from under its control, and without its consent, said prisoners, until the final adjudication of the court upon the matter before it. The answer of the defendant, when analyzed, seems to present the following grounds for the justification or extenuation of the act for which he was called upon to answer: 1st, the failure of the sheriff to properly guard the prisoners; 2nd, that the court continued until the next day the motion to redeliver them to the military authorities; 3rd, that he was compelled to act in the manner he did by the orders of his superior officer, Major-General Magruder. As a brief comment upon these assumptions in the defendant's answer, we will say: That he labored under a delusion if he supposed that he could be held officially responsible for any neglect of duty by the sheriff. If, however, the sheriff was derelict in duty, he should have brought the matter to the attention of the court, by whom it could and would have been properly corrected. No such fact, if indeed it were the case, was intimated to the court from any quarter, and the continued presence of the prisoners before the court, from time to time, is at least prima facie proof of the sufficiency of their guard.

"The continuance of a question by a court, that it may be correctly determined by the aid of proper reflection and the examination of precedent and authority, can only be regarded as a justification or extenuation of such an act as was committed by the defendant, when the civil tribunals of the country sit merely for the purpose of registering the edicts of the military

authorities. The presentation of such a matter in an answer is rather an aggravation than an extenuation of the outrage committed upon the authority of the court.

"Nor can an illegal act be justified, no matter how high the source from which it emanates, by an order from superior authority. Military officers are bound to obey all legal orders of those by whom they are commanded. But there is nothing better settled, as well by the military as the civil law, than that neither officers nor soldiers are bound to obey any illegal order of their superior officers; but, on the contrary, it is their bounden duty to disobey them. The soldier is still a citizen, *and as such is always amenable to the civil authority.* We are of opinion, therefore, that the orders of Major-General Magruder can furnish the defendant, Major Sparks, no justification for his forcible interference with the jurisdiction of this court, and setting at naught its lawful orders. If, however, he was in truth acting, as he claims, in obedience to the orders of the major-general commanding this military district, it certainly would go far to excuse him. While an officer must not obey an unlawful order of his superior in command, yet, as in all cases where he declines obedience to it he acts at his peril, much indulgence should be shown in extenuation of his obedience to such orders from those he is ordinarily bound to obey. Especially should this be so, when the orders come to him from such high authority as that from which the one now in question is claimed to emanate.

"But if these considerations extenuate the act of Major Sparks, they do so only by inculpating Major-General Magruder. If the act was done

in obedience to his order, he is the princial offender. Those by whom he has, if this be so, perpetrated so glaring and palpable an outrage upon the law and the authority of this court, are alike subordinates in criminality, as inferiors in rank. But the high position of this officer and the important duties with which he is entrusted by the country, forbid that we should indulge the supposition, in a state of case upon which he has not been heard, that 'he has converted the means of discipline, intended for the defense of order, and thus has turned the instrument against the power that ought to wield it; for it is the civil government alone that stands for the state, and the military is only an instrument that it uses as its judgment requires.' Better far would it have been, for the prisoners who are in custody of the court, though doubly guilty beyond all that has been charged against them, to go unwhipped of justice than for the civil authorities of the state to be subordinated to military control, and made dependent upon the consent of the latter for the exercise of their legitimate functions. The one, though to be deprecated, would be of comparatively little importance, but the other would be a vital blow at the constitution, and the principle upon which our government is organized.

"It is much to be regretted, especially at a time like the present, that the major-general charged with the defense of the state should seemingly be brought in conflict with the judicial authority. But we should be derelict in the discharge of the high trust committed to us by the constitution and the laws if we should permit to pass unquestioned so palpable and glaring an outrage upon the law and the mandates of the court in which we have been called to pre-

side, as that with which, we trust improperly, Major-General Magruder is implicated by the record now before us. We deem it, therefore, our duty as judges, our duty to the country, and also our duty to Major-General Magruder, to afford him an opportunity of relieveing himself from the improper attitude in which, as the record now stands, he is presented before this court. In a judicial tribunal, the rights of the humblest citizen are equal to those of the highest civil or military dignitary. If such an act as that in which Major-General Magruder is here implicated by the answer of Major Sparks were charged upon an unknown and private citizen, there is no question that it would be said at once to be the imperative duty of the court to call him before it by attachment, to answer his apparent contempt of its authority. And if it were not for the situation of the country, and the important duties with which Major-General Magruder is charged for its defense, this would be our plain duty in the present instance. But, under the circumstances which now surround us, we think, while we endeavor to enforce respect for the authority of the court, and to sustain the law, we should not be unmindful in other respects of the public welfare, or forgetful of the important duties with which the distinguished officer, whose acts are now in question, has been entrusted, or the respectful consideration due to his high official position. In view of all these considerations, we are of opinion, and do, therefore, order that a citation be issued to Major-General Magruder, accompanied by a copy of Major Sparks' answer under oath before this court, at Tyler, on or before the fourth Monday in April, 1864, and show cause why he should not be held as having acted in contempt of the authority of this court, in or-

dering said Sparks to take from the custody of the court the prisoners heretofore named, and to disregard the writ of habeas corpus issued by the court by virtue of which said prisoners were brought before it, or any subsequent writ which might be issued."

FROM 27 TEXAS 705:

"Moore, J. This case was transferred to this place from Austin to afford the defendant Magruder an opportunity of filing an answer, in obedience to an order of the court then made upon him. His answer is now before us, and we therefore proceed to make a final disposition of the case. The preliminary facts out of which this proceeding has originated are sufficiently stated for the proper understanding of the action of the court in the opinion which was delivered in it at Austin, and need not be here again repeated. At that time we felt constrained to say from the facts then disclosed, that Major-General Magruder was apparently guilty of a palpable and glaring violation of law and contempt of this court. We trusted, however, that it was only necessary to give Major-General Magruder an opportunity of being heard, to relieve him from so disreputable an imputation, and the court from the painful duty of pronouncing the highest military officer of this department guilty of using the authority with which he has been entrusted for the public welfare and the defense of the state, as a means of violating the law, interfering with and contemning the authority and process of its courts, and thus violating social order, which he should have been the first to have upheld and sustained. We have, however, we regret to say, been wholly disappointed in this just expectation. The an-

swer of Major-General Magruder, instead of exculpating him, places him, if possible, in a still more unenviable light than did the facts previously developed in the record. Before reading his answer, it might have been supposed that his violation of the authority of the court and interference with its functions was not the result of premediation and design, or the assumption of an authority plainly at war with the most obvious and best settled principles of law and judicial procedure.

"The pretext upon which Major-General Magruder undertakes to justify his interference with, and attempting to set as naught the authority of the court, is mainly upon the startling ground that the court does not acquire jurisdiction of the persons of the applicants for a writ of habeas corpus, pending the hearing on its return. That the extent of the power he claims for himself, and the restrictions he assumes to place upon the authority of the court in the discharge of its duties, when its functions are invoked by this great writ for the security of personal liberty, may be more readily perceived, we make the following extracts from his answer:

" 'The major-general commanding was not aware that these persons had passed out of the hands of the military authorities when they were brought before the supreme court upon the writ of habeas corpus; nor did he intend, when they were brought before that tribunal, to yield them to the entire control of the civil powers, until it had been decided that they were illegally arrested, and unlawfully in the possession of the authorities restraining them of their liberty. The mandate of the court required the

prisoners to be brought before it, and the parties detaining them to show by what authority, etc. The prisoners were brought, and the proper returns were made, and the major-general commanding supposed that he had virtually the possession of the prisoners, and the honorable court before whom they were brought should decide whether or not they were properly and legally in possession of the military authorities. The idea that the parties suing out the writ of habeas corpus were to be entirely under the control and direction of the supreme court, and entirely free from the control of the military authorities as soon as they were brought before that tribunal, was one which the major-general commanding could not entertain; nor did he contemplate that the guard which he had ordered to accompany these men from San Antonio to Austin, in obedience to the mandate of the supreme court, had left the prisoners in the hands of the sheriff of Travis county, and returned to San Antonio, until made acquainted with the fact by Major Sparks, commanding post at Austin.'

"In another part of the answer he says: 'This was the view taken by the major general commanding, and he did not suppose that the prisoners had been transferred from his custody to that of the civil authorities, but that he was only liable in case they were not before the court, when required and necessary to be there pending the trial or investigation of the case. The law holds the party restraining another of his liberty responsible for his act, if the restraint be illegal, but it does not take the prisoner out of his custody until the illegality is determined.'

"Again he subsequently says: 'An official copy of the law of congress suspending the writ of habeas corpus having been received at these headquarters, and under it and in accordance with its provisions Lieut. Gen. E. Kirby Smith, commanding department trans-Mississippi, having ordered the major general commanding to detain the prisoners heretofore alluded to, an order was dispatched forthwith to Maj. Sparks (whom the major general commanding believed to be in possession of the prisoners, the guard from San Antonio having returned home, and the commander of the post at Austin having been ordered to guard the said prisoners), directing him to bring Messrs. Peebles, Baldwin, Zinke, Hilderbrand and Seeliger away from Austin under a sufficient guard, and to disregard 'the present writ of Habeas corpus, or any writ which may subsequently be issued.'

"We will not pause to cavil with the seemingly contradictory statements shown in these extracts from Major General Magruder's answer. It is immaterial at present to inquire whether he knew, as he says he was informed by Major Sparks, that the prisoners had been placed in charge of the sheriff, or supposed that they were still under the control of his subordinate officers, as he insists should have been the case. The prisoners, he evidently intends to insist in point of right, if not in fact, were under his control; that they did not, upon the return of the writ of habeas corpus, pass into the custody and jurisdiction of the court; that at least he did not intend to surrender the entire control of them to the civil authority. Upon this hypothesis, and an equally obvious misconception of the facts of the case and the law of congress suspending the privilege of the writ of hebeas cor-

pus, he seeks to excuse, if not to justify, his interference with and violation of the mandate of the court, and his order to his subordinate officer to disregard its process. If it were not for the mischievous character of such an assumption, coming from such source, we would deem it scarcely necessary to say that it is unsustained by judicial authority or plausible argument. It will perhaps be admitted, even by those with whom it has become of late too much the fashion to violate the rights of persons and property upon the plea of a 'military necessity,' as a novelty of which the defendant is entitled to the paternity.

"He admits now, it is true, since, as he says, this seems not to be the view entertained of the law by this court, that he may be mistaken as to its correctness; but if so, he seems to rely upon his ignorance as an ample vindication of his crime. When the criminality of an act depends solely upon the intention with which it is committed, ignorance or inability to obtain proper information may be considered in determining the question of guilt. But the charge upon which these parties are before us is for an act in violation of law, and therefore a crime independent of the intention of the parties who committed it, as much as any other crime for which they could be indicted. It can, however, excite but painful reflection to find an officer in the high position in which Major General Magruder has been placed, and who must so often be called upon to deal with the rights of person and property of many citizens, seeking to defend himself from a criminal imputation upon the ground of ignorance. Such a plea could not be admitted in favor of the humbest citizen, with sufficient capacity to render himself re-

sponsible for the consequence of his acts. Does it come with a better grace from this high officer? At least we think it is not expecting too much of him, if ignorant of the plainest and simplest principles of the administration of the law, that he should inform himself in respect of them before undertaking to interfere with and control the judicial tribunals of the country.

"That hereafter even Major General Magruder may have no ground to doubt the rule by which he should be governed when called upon to answer to a writ of habeas corpus, we quote what is said on this subject by a standard elementary writer: 'Pending the examination or hearing, the prisoner in all cases on the return of the writ is detained, not on the original warrant, but under the authority of habeas corpus. He may be bailed on the return de die in diem, or be remanded to the same jail whence he came, or to any other place of safe keeping under the control of the court, or officer issuing the writ, and, by its officer, brought up from time to time, till the court or officer determines whether it is proper to discharge or remand him absolutely. The King's Bench may, pending the hearing, remand to the same person or to their own, the Marshalsea. The efficacy of the original commitment is suspended by this writ while the proceedings under it are pending, and the *safe keeping of the prisoner is entirely under the authority and direction of the court issuing it, or to which the return is made.* (Per Nelson, In re J. Kaine, 14 How., 134; Bac. (710) Abr., title Hab. Corp., B. 13; The King v. Bethel, 5 Mod., 22, 1 Vent., 33-346; Fort, 242; Hurd on Hab. Corp., 324.)

"There is another point, the importance of

which forbids our passing it unnoticed. Major Gen. Magruder bases his right to order his co-defendant Sparks to take the prisoners, who are under the control of the court, from out its custody, and to disobey any future writ from the court, upon the recent act of congress suspending the privilege of the writ of habeas corpus, and that there was an order under it from the commanding general of the Trans-Mississippi department, for the detention of these prisoners. If it were admitted that this law, and the alleged order made under it, are quite sufficient to have stopped the investigation of the case pending before the court on the habeas corpus, and to require the immediate remittal of the prisoners to the military authorities, it is altogether evident that it could only have been its error in so doing, it would not have justified the defendants, or any others, in taking the law into their own hands and disobeying or violating its process. The proposition that the process of a court in a case which, ultimately, it should dismiss, may be treated with disobedience, is one which cannot, for moment, be sustained. In discussing this question in the case of Passmore Williamson, Mr. J. Black remarks: 'We, ourselves, have heard many cases through and through before we became convinced that it was our duty to remit the parties to another tribunal. But we never thought that our process could be defied in such cases more than in others.' And Mr. Justice Lewen, with great force, says: 'It is an essential element of judicial authority that it must be the judge of its own jurisdiction; and I do not know that this rule is peculiarly applicable to the higher courts. The lower must act upon it, subject to the higher social law that is involved in official subordination. Often the question may be erroneously de-

nied. Often such decisions may result in great injury to the citizen, but it is the lot of government to err, because it is human; and a man of well-trained mind will think it no great hardship to submit to authority even in error. In the name of order, the country demands, and has the right to demand it.' Again he says: 'In civil matters there can be no moral principle of higher importance than the one that is most deeply involved in this case. It is a principle of action that is as binding on the conscience as any other. It is the great moral principle of social man. Without it, we endanger and retard our social progress. Without it, we confound all official subordination, and affect with disease the very organs of social life. This principle expresses itself, as best it can, in our civil institutions, and thus originating, they are morally entitled to our respect and obedience, imperfect as we may suppose them to be. He that rejects this principle from his moral code, or gives it a low place there, can hardly be an orderly citizen but must be dangerous to the public peace and progress, in proportion as he is otherwise intelligent, influential and active.' (26 Penn. St., 2 Casey, 9.)

"We may also add, the prisoners before the court, as appears from Major General Magruder's answer to the writ of habeas corpus, were arrested by his order, and not by that of the lieutenant general commanding the Trans-Mississippi department. The law suspending the privilege of the writ of hebeas corpus, therefore, had nothing to do with the case presented by his answer for the investigation of the court. Nor had the alleged subsequent order of General Smith, for the detention of these parties, been presented to the court in a manner to re-

quire it to suspend further action upon it.

"The order of Major General Magruder, directing Major Sparks to disregard 'the present writ of habeas corpus, or any writ which may subsequently be issued,' is also clearly in violation of the act of congress, by which he pretended to have been guided. This act confers no such authority on the high officers authorized by it to suspend the privilege of the writ in the particular cases enumerated in it; much less does it tolerate its assumption by Major General Magruder, or its delegation by him to his subordinate officers. The law does not forbid or suspend the issuing of the writ, and unless it appears from the application that relief could not be granted, it may and should be issued by the court, and it is, *in all cases*, the duty of the party, to whom it is directed, to answer to it. That the privilege of the writ in certain cases, and under particular circumstances, is suspended, which otherwise would have entitled the applicant to the production of his body along with the return to the writ, and an inquiry by the court into the cause of his detention, gives no sanction to this plain misconstruction of the law, and usurpation of power claimed by Major General Magruder, and attempted to be conferred by this order upon his subordinate officer.

"The answer, we believe, presents only the additional fact that the defendant, when he gave the orders to his subordinate officer to wrest from the court the prisoners who were in its custody, to disobey the mandate by which they were held, or any writ it might issue, and to remove them, under military escort, to such place as he might direct, at the same time causing a letter to be addressed to the court, in

which he assured it that he intended no contempt of the court, but entertained for it the most profound respect; that it was his pleasure, at all times, to sustain the civil authorities; and that it was also his studious desire to avoid all conflict between the military authorities and civil tribunals. Similar manifestations of exquisite politeness by criminals, while in the act of violating the law, will, perhaps, readily suggest themselves to the readers of fictitious literature, but we doubt if its parallel can be easily found in the dry details of judicial proceedings.

"We have felt called upon to say so much in this case, because, from the position and official responsibility of the principal offender, and the situation of the country, we cannot resort to the ordinary punishment of imprisonment by which such offenses are usually repressed and corrected. Yet the magnitude of the offense, in its paralyzing influence on the usefulness of the judicial tribunals of the country, if unchecked, and that it is the first instance of the kind in which the court has been called to act since its organization, and especially the vital interest of the citizens in respect to personal liberty and security from military usurption, forcibly admonish us that the acts of the defendants should not be passed by without the brand of our most decided condemnation.

"As we have said in our former opinion, the order of Major General Magruder furnishes no justification for the act of Major Sparks, and (713) the court would be fully justified in punishing him by either fine or imprisonment. But such a fine as the law authorizes us to impose, would, in our opinion, be altogether inadequate to the offense of which Major General Magru-

> der is guilty. The situation of the country, as we have said, forbids our attempting to punish him by imprisonment. We feel that it would illy comport with the dignity of the court to visit its penalties upon the subordinate offender while the principal is enabled to go unwhipped of justice. We shall, therefore, discharge the rule in this case, with a judgment against the defendants merely for costs. But as it involves questions of equal, if not greater, political than judicial importance, we will order a copy of the proceedings had in the case to be transmitted to his excellency, the governor, that he may give them such consideration as in his judgment they may deserve, and that he may take such action in the premises as may be compatible with public policy and interest."

Octiber 8, 1866, a new constitution was proclaimed by Governor Throckmorton as having been adopted (5 Gammel's Laws of Texas, pp. 857-886). In respect of the Governor and his powers, *habeas corpus*, suspension of laws and superiority of the civil authority it terms were like those of the previous constitutions.

THE EMANCIPATION CASES, 31 TEXAS 504:

These cases were decided at the Austin term in 1867 by a "Supreme Court" whose members were appointed by Brevet Major-General Griffin under Sec. 2 of the Reconstruction Act. of July 19, 1867.

The cases turned on legality, vel non, of contracts whereunder slaves were hired or sold and that, in

turn, was made to depend upon whether the Emancipation Proclamations of President Lincoln had lawful effect to free slaves in Texas. It was held (by the majority) that the Proclamations were without legal effect on property rights, that slaves became free (only) either by subsequent Act of Congress or by adoption of the XIIIth Amendment. Judge Hamilton (having concurrence of Judge Caldwell) dissented, his argument, however, being bottomed upon fact of *actual war* (by what amounted to a foreign government).

The Proclamations (see p. 548 of 31 Texas) purported issuance by the President in virtue of "the power vested in him as Commander in chief * * * in time of actual armed rebellion * * * as a fit and necessary war measure for suppressing said rebellion."

EXCERPTS FROM MAJORITY OPINION:

"Morrill, C. J. In a country, nation, or state, where 'what pleases the prince is law', it is only necessary to know the actions or even the wishes or whims of the prince to adjudicate upon the rights of person and property. In a state or nation where, in times of war, what pleases the commander-in-chief of the victorious party is law to the conquered, a proclamation of the commander, setting forth his will, would be decisive of the status of the conquered. There are but few nations, even among the civilized of modern times, who in times of peace are gov-

erned by a 'rule of action prescribed by the supreme power in a state!' and still less is this number in times of war. Even in that nation which we denominate our parent country, and which is, par excellence, a country of laws in peace, the happiness or misery of the conquered in times of war depends in a great degree upon the wishes, will, whim, or caprice of the victorious commander. Whether the conquered shall retain their lives, liberty, or property, or whether their property shall be confiscated and they themselves blown from the cannon's mouth, depends in a great measure upon the humanity, avarice, or bloodthirstiness of the general in command. The history of the world is a detail of wars, 'and woe to the conquered' blackens every page. But there is a nation whose theory of government is based upon law, both in peace and war; where the organic law provides that no person shall be deprived of property without due course of law;' and where in times of war not the commander-in-chief of the army and navy, but the 'congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water,' 'to raise and support armies,' 'to make rules for the government and regulation of the land and naval forces.' "

"It is evident that if, during the rebellion, the citizens of Texas were citizens of and subject to the constitution of the United States, then they could not 'be deprived of property,' in salves, money, stocks or agricultural products, without due course of law. If they were a part of another state or de facto government, and they and their property were captured by the forces of the United States, in that case not the commander-in-chief of the army and navy of

the United States, but congress, and congress alone, had and has 'power to make rules concerning those captures.' In either case the proclamations, military orders, or whatever else they may be called, can have no effect or force upon any other than the men subject to the commander, unless they may be based upon an act of congress. The powers of the government of the United States are separate and distinct. The powers which belong to one department are exercised by the officers belonging to that department, and exercised independently of any of the others. Each department is separate, co-ordinate and equal. No majesty is recognized but the majesty of the law; and no man can exercise any power but such as has been delegated to him merely as the servant of the people."

"If, as contended, the proclamation of the president, ipso facto, made all slaves free, it would be in utter disregard of the acts of congress, thus pointing out the manner and conditions of their freedom, and virtually nullify them. And if the judiciary prove subservient to the executive, our boasted republican government is really, quoad hoc, an absolute monarchy in times of war."

"When the war occurred it was the business of the United States to take such measures as would most certainly, in its judgment, overcome the rebellion.

"The war had progressed with varied success for nearly eighteen months, and had assumed vast proportions on either side, before it was determined upon, as a measure of war, by the United States, to declare the emancipation of the slaves of the south. It was of course, so

far as the power was concerned, predicated solely upon the rights of the government under the laws of war. That it was felt to be an act of justice to the slaves, when made necessary by the exigencies of the war, by the president of the United States, may be inferred from the last paragraph in his memorable and final proclamation of emancipation of the 1st January, 1863, and that as a measure of war it was resorted to."

"I am asked to point to the provisions in the constitution of the United States which authorized the proclamation. If I have made myself understood, this has been answered. But, in further answer, I reply, The same provisions which conferred authority upon the president to send hostile armies into the midst of the southern states to make war, to seize and destroy property, and, if need be, to desolate the land to maintain the national authority.

"These things could not have been done in time of peace, any more than the emancipation of slavery, without a violation of the constitution, but in time of war they were properly done."

As indicated by the words used by them and by sentiments expressed by the Supreme Court of the State (in the cases cited), the People of Texas thought they had adequately secured their liberties against tyrranic encroachments by those of military bent. But events occurred to demonstrate their mistake and to take them, in rapid movement, to corrective action.

E. J. Davis was (in 1870) Governor of Texas by

selection under the Reconstruction Acts of Congress. He manifested appetite for power, and he much desired use of soldiery to achieve and enforce it. Yet he paid some respect to law (at least, its forms) and, thereby, set example that might well be commended to remote subsequent Governors. The Constitution in force at that time allowed *habeas corpus* to be suspended on occasion and allowed laws to be suspended by "the Legislature *or its authority*," i. e., (apparently at least) the Legislature *might delegate* (to the Governor, e. g.) authority to suspend the laws. In supposed authority of those terms of the Constitution the Legislature, at Governor Davis' insistence, enacted a "Militia Act," effective June 24, 1870, (6 Gammel's Laws of Texas, pp. 185-190) of terms of which Sections 25, 26 and 27 are relevantly illustrative:

> "Sec. 25. In time of war, rebellion, insurrection, invasion, resistance of civil process, breach of the peace or imminent danger thereof, the Governor shall have full power to order into active service the military force of this State.
>
> Sec. 26. It shall be the duty of the Governor, and he is hereby authorized, whenever in his opinion the enforcement of the law of this State is obstructed, within any county or counties, by combinations of lawless men too strong for the control of the civil authorities, to declare such county or counties under martial law, and to suspend the laws therein until the Legislature shall convene and take such action as it may deem necessary. In this event the Governor, by

his proclamation, shall designate the county or counties wherein the laws are to be so suspended; and the Governor shall call out such part of the State Guard or Reserve Militia or State Police as may in his opinion be necessary to the suppression of disorder. The expense of maintaining the State Guard or Reserve Militia, called into active service under this section may, in whole or in part, in the discretion of the Governor, be assessed upon the people of the county or counties where the laws are suspended. For the assessment and collection of such part of this expense as may be required to be paid by the county or counties where the laws are suspended, the Governor may provide, and he may also prescribe, the necessary regulations therefor, and may designate the officer or officers who shall make such assessment and collection thereof.

Sec. 27. Whenever the law may be suspended, as provided for in last preceding section, it shall be the duty of the Governor to provide for the trial and punishment of offenders; and the Governor shall make all details of officers for this purpose, and prescribe all necessary regulations for the formation and government of courts martial and military commissions for this purpose."

Of the "Militia Act" and "executive action" under it it was said (in Brown's History of Texas, Vol. II, p. 454):

"The Governor was also authorized to declare martial law, at his discretion, to appoint military commissions to try accused persons, and to enforce this power through the military subject

to his command. He exercised this power in a number of counties in the State—Marion, Hill, Limestone, Walker and others, ordering to Groesbeck, in Limestone County, a body of negro troops from Marion county, to enforce his mandates, and white troops to the other counties. He ordered men to be tried by military commission, several of whom were sent to the penitentiary. In Hill a tribute of $3,000.00 was levied on a farmer by the adjutant-general Davidson, who afterwards fled the State with $40,000 of State funds."

Governor Davis' acts were so rapidly done and the resentment of the people was so instantly spontaneous as to produce a convention at Austin as early as August____, 1870, called by prominent citizens of various political faiths and held in remonstrance. A result was a petition to the United States Congress for relief. Amongst the Petition's recital (see "Weekly Austin Republican," August 3, 1870) are these:

"PETITION of the People of Texas to Congress to Guarantee to this State a Republican Form of Government. We, the undersigned citizens of the State of Texas, without regard to party or race, being thoroughly convinced that our civil liberties are in great danger, if they have not been actually overthrown, by certain laws recently enacted by the Legislature of our State, now in session, which laws were prepared and approved by our present Executive, do hereby humbly petition the Congress of the United States to take such action as will save the good people of this state from the grievous

oppressions of said laws, and we also appeal to our fellow citizens of the United States, without regard to party, to aid us in our petition against the overthrow of our liberties, which cannot be effected in one State without endangering the liberties of the people of every other State of the Union. To prove the necessity of this petition and appeal, we have only to cite the provisions of these laws, which constitute a series of enactments, known as 'administration measures,' from the fact that they were prepared by our State Executive, and passed by the Legislature in conformity with his recommendations. The primary and most important of these enactments are: An act to provide for the organization of the Militia; * * * Much of the other legislation, thus far enacted, is but an adjunct to these primary 'administration measures, as will be proved by reference to their provisions. We respectfully submit these enactments to the candid impartial judgment of Congress, and of our fellow citizens in other States more happily situated than our own. * * * It will be seen that the Governor is the commander of the military forces of the State; * * * he can declare martial law and suspend the laws upon a breach of the peace *or immient danger thereof;* * * * he can try and execute the free citizens of this State by courts martial and military commissions composed of his own creatures; he can depose our judges; he can suspend the writ of habeas corpus, and make our civil officers subservient to the military, and this military not drawn from the body of the people but selected, officers and privates, by himself. If this act leaves anything wanting to create him a despot with unlimited powers, we have failed to discover it. We appeal to Congress and to our fellow-citizens in other States to save us from the evils

which must necessarily flow from any attempt to execute this law in its letter and spirit, for it is a flagrant violation of every article and principal of the constitution of the United States and of this State. * * * Whilst the standing army act gives the Executive regal power over the civil liberties of the people, this act destroys the sacredness of the household by permitting him to send broadcast through the land a band of spies and detectives to worm themselves into the confidence of men for the purpose of betraying them. Whilst the standing army overawes open discontent, the spies and detectives are intended to crush thought and private opinion. This force is the very essence of *Gensdarmerie* of the most absolute monarchies. It is abhorrnt to every idea of republican institutions and American liberty, and we feel assured that such will be the deliberate judgment of every enlightened citizen of our country, ot whom we again appeal to save us from the operations of this law, which cannot be enforced without destroying the bonds of society and all confidence among men. * * * "

Military encroachments (particularly under the "Militia Act") was the principal theme of the Democratic Platform adopted in January, 1871 (see "Galveston Daily Civilian," Jan. 27, 1871). It contained these declarations:

" * * * the Radical State Government has forfeited all claims to the respect of mankind, by its unconstituitonal and oppressive enactments, * * * First—in violation of the Federal and State constitutions, the Legislature of this State has conferred on the Governor, in obedi-

ence to his own dictation, the power to suspend the writ of habeas corpus, to declare the civil laws suspended, close the courts, refuse to our citizens the right of trial by jury, and subject them to trial by a court martial, composed of men who know nothing of the rules of law and evidence, and this in times of profound peace. * * * "

ExGovernors Pease and Hamilton and United States Senator Hamilton ("all well-known Union men" and others of like political faith) joined ex-Governor Throckmorton and John Ireland and other well-known Democrats in calling the "Tax-Payers' Convention" which met in Austin September 22 to 25, 1871. By resolutions unanimously adopted the Convention made appeal to the Legislature for relief against Governor Davis' regime. (Brown's History of Texas. Vol. II, pp. 456-465.)

Excerpts from Resolutions Adopted

"The violations of constitutions and disregard of law have been very frequent and are very numerous; but, frequent as they have been and numerous as they are, we have been unable to find a single one, of either class, based on an honest desire to accomplish good to the people of the State, or to secure prosperity to the country. On the contrary, their apparent cause seems uniformly to spring from one grand purpose, viz.: to concentrate power in the hands of one man, and to emasculate the strength of the citizens of Texas as a free people.

"However hopeless such a design might have

appeared, and however little feared by the reasoning and intelligent might 18 months ago, yet as this day, we must confess, the scheme has far progressed toward consummation, and the people stand stripped of many of the inalienable rights of freemen, while he who is now clothed with these lost rights of the people, gloats on their humiliation and congratulates himself on the possession of kingly power.

"We may safely state that the principal effect of each of the acts we shall name has been, and is now, to abridge the rights of the citizen, and to enlarge, soldify and confirm the power of the Executive.

"2. At a time when measures of grave importance of themselves, and of vital interest to all the people were under discussion in the Senate and not matured, the majority in the State Senate, arbitrarily and without authority of law, placed nearly all the minority under arrest and deprived them of a voice in behalf of the people, and so held them in arrest and silent until the militia law, the police bill, the enabling act, the registration act, and the election law were passed, and until nominations for judicial and other important officers were approved of; all of which measures go to the oppression of the people; and many of the officers confirmed were unqualified as to capacity, corrupt as to morals, and entirely unfiit for high position in any State.

Under the Authority of Martial Law now in force, and being daily executed, the Executive is vested with unlimited power. He is clothed with the power to declare martial law on the most paltry pretexts. He may, to all intents and purposes, suspended the writ of *habeas*

corpus when there is no rebillion, no invasion, and when the public safety does not require it. With martial law declared, and the writ of *habeas corpus* practically suspended, the Executive becomes Dictator in Texas, and his will the sole guide to his action, he may take property or life, and be responsible to no tribunal of justice in the State, so long as he remains Governor and under existing laws.

"It might possibly be said, that though such unlimited power is with the Executive, yet that all the probabilities are that he will not call it into exercise; but already, under the arbitrary power conferred, he declared martial law in the county of Hill, and through machinery rapidly extemporized, gathered by the hands of his adjutant-general, large sums of money from citizens, while under duress, and without a judgment of any court of competent jurisdiction; and under the same arbitrary power, martial law was declared in Walker County, and then, under like machinery, gathered large sums of money from the people, and, in addition thereto, incarcerated a freeman of the State of Texas in the penitentiary; and all this in a time of profound peace, when there was no rebellion, no invasion, when the public safety was not threatened, and when the civil officers in the respective counties were fully able to execute all process, and to arrest all violators of the law. And again in the county of Bastrop martial law was time and again threatened, and held in terrorum over the people thereof, with intent to force the grand jury of said county to indict, by false indictments, the good people thereof, and thus forge a reputation for that people, of being a lawless and criminal people.

"These things have grown into history, and are now recognized as authentic occurrences of the times."

* * *

"19. By orders executed through his armed bodies of police, the Executive has taken control of peaceable assemblies of the people, called together for peaceful and lawful purposes, and there suppressed free speech, under threats of arrest, and subjection to punishment as criminals. (Galveston case.)

"20. The Executive has deliberately disregarded the solemn judgment of the District Court, and ordered his policemen to contemn the court, and by force, with arms in their hands, to defy the court, and to execute his will in a question of law where the court had decided the case and entered its judgment of record. (Brownsville case).

A result of those occurrences was the election of a Legislature of such views as that repeal of the "Militia Act" immediately followed its convention. See 7 Gammel's Laws, pp. 468-9.

The Democratic Platform of 1873 was written by a committee of which John H. Regan was Chairman and whose membership included R. R. Gaines, T. J. Brown, Seth Sheppard, J. W. Throckmorton, and Joseph D. Sayers. It recited:

"* * * We congratulate the people of Texas on the repeal by the Thirteenth Legislature of

> a number of oppressive, odious and unconstitutional acts, passed by the Twelfth Legislature, in pursuance of the Radical policy to overthrow the government of the people, and among which acts were: 1. The Military Law, whereby the Governor was authorized to suspend the writ of *habeas corpus* and establish martial law, thereby depriving the citizens of all legal and constitutional protection, and subjecting their lives, liberty and property to the unrestrained caprice and malignity of a partisan Executive. * * * "

With the military or "supreme executive" activities of Governor Davis' administration yet recent history, a constitutional convention met in Austin (September 6, 1875) and prepared the instant constitution and it was adopted by overwhelming vote of the people February 15, 1876. That instrument (in respects important here) differs widely from all previous Texas constitutions and, in fact, from any and all American constitutions. For whereas anciently in Texas (and presently in Colorado, Idaho, Kentucky, Montana, Nebraska, Pennsylvania, and some twenty other States) "the supreme executive power" was vested in the Governor, no such or comparable term is to be found in the Texas constitution of 1876. For whereas theretofore it was provided only that the "privileges of the writ of *habeas corpus* shall not be suspended, *except* when in case of rebellion or invasion the public safety may require it" (like as in the constitutions of the United States and of more than thirty States), the Texas constitution

of 1876 (in Sec. 12, Art. I) declares that "the writ of *habeas corpus* is a writ of right, and shall never be suspended." And whereas under former constitutions of Texas (and instant ones of many other States) laws might be suspended by "the Legislature *or its authority*," Sec. 28 of Art. I of the constitution of 1876 provides that "no power of suspending laws in this State be exercised, except by the Legislature."

Since, as must be admitted on all hands, "Martial Rule" cannot lawfully co-exist with unsuspended *habeas corpus* and municipal law, it cannot be doubted that our people consciously sought to make lawful "Martial Rule" impossible by the substantial changes deliberately made in their constitution in 1876. That they did so is, in effect, recognized and declared by the Court of Criminal Appeals in Arroyo vs. State, 69 S. W. 504, wherein it is said:

> "Thus we are confronted with the proposition, which Appellant assumes to be correct, that the legislature has authority to delegate power to the city council of the city of Dallas, under its special charter, to supersede and set aside any state law which may come within the terms of the delegated authority. Article 1, Sec. 28, of the state constitution provides: 'No power of suspending laws in this state shall be exercised, except by the legislature.' Prior to 1874 this section was as follows: 'No power of suspending laws in this state shall be exercised, except by the legislature, or its authority.' It may have been the law or a correct contention, under prior constitutions in this state, to assume and assert

the proposition here contended for by appellant; but with the change of the constitution the right of the legislature to delegate its authority ceased to exist. It is not necessary to go into the history of the reasons for this change in the constitution, for it is too well known and too fresh to be easily forgotten. Without reviewing the history of the oppressions which grew out of the suspension of laws by reason of such delegation of legislative authority and the declaration of martial law scarcely more than a quarter of a century in the past, it is sufficient to state the fact of such occurrences, and that this change in the organic law swiftly followed, prohibiting such action by the legislature. The legislature is but one of the three co-ordinate branches of this government, and has no authority to set aside and override the express limitations upon its power. This matter has been reviewed in our state by our courts of last resort, and the matters fully and freely discussed, the result of those decisions being adverse to appellant's contention. Therefore we deem it unnecessary to enter into a further discussion of the matter. In support of our conclusion, holding that the position assumed by appellant is not the law, we cite the following authorities: Ex Parte Ogden (Tex. Cr. App.) 66 S. W. 100; Burton vs. Dupree (Tex. Civ. App.) 46 S. W. 272; Ex Parte Coombs, 38 Tex. Cr. R. 648, 44 S. W. 854; Ex Parte Ginnochio, 30 Tex. App. 548, 18 S. W. 82; Ex Parte Sandstrom, 25 Tex. App. 133, 8 S. W. 207; Bohmy vs. State, 21 Tex. App. 597; 2 S. W. 886; Flood vs. State, 19 Tex. App. 584; Angerhoffer vs. State, 15 Tex. App. 613; 3 Am. & Eng. Eng. Law, p. 698 et seq. and notes for collated authorities. Under these authorities, and under the constitution,

the legislature had no right to delegate its authority in a municipal charter to set aside, vacate, suspend, or repeal the general laws of this state. Any act of the legislature which seeks to confer such jurisdiction upon a municipal corporation is violative of the constitution, and therefore void. The city ordinance, as well as the provisions in the charter granted the city of Dallas, relied upon by appellant, being in conflict with section 28 of the bill of rights, in so far as they undertake to grant authority to supersede the state law, are null and void."

We repeat: The terms of the Texas constitution plainly negative lawful existence of "Martial Rule" at any time, under any circumstances. Alternatively we say: Since no officer or body, save the Legislature itself, may lawfully work suspension of laws, legal "Martial Rule" cannot possibly exist so long as the Legislature has not suspended those laws whose suspension is indispensible to that "Rule." Such, we repeat, is the literal meaning of the constitution's terms, and there is, in consequence no ground for contrary implications. But if there were reason for doubt in the premises, the history of Texas (popular and judicial) in its every relevant incident, denounces all pretexts of military rule.

Nor may counsel for the Governor and his military men produce authority for a contrary view. This they have attempted, but in the attempt they have failed for reasons already given and for rea-

sons now to be suggested.

Their first reference, of course, is to United States ex. rel. McMasters vs. Wolters, 268 Fed. 69. In that case, it ought be remembered, authority of the Governor to institute "martial law" was not in issue. McMasters *conceded* the Governor's alleged authority and it so stated by Judge Foster. Its immediate context shows that Judge Foster's statement that the "Governor had complete authority to institute martial law" was meant to refer to his authority to use the militia to enforce the law, and not to any authority to set the law to one side. Again: the provost court was undertaking to enforce the "civil law" in trying and convicting McMasters; he was sitting in the place of the municipal judge who had been suspended (for alleged delinquencies), and Judge Foster merely held that suspension of the municipal judge was not suspension of the law.

In-so-far-as Martin vs. Mott, 12 Wheat, 29-31, and Luther vs. Borden, 7 How. 1, relied upon by Appellants, it ought to be remembered that those cases cannot be called to their aid except upon pure *assumption* that the "discretion" claimed for the Governor has, in truth, been vested in him by Texas law, and that would amount to assuming as settled one of the very points which are now at issue. In neither of those cases was there possible ground upon

which a doubt of the lawful vesting of the power there involved could be founded. In Martin vs. Mott the power referred to is the unquestioned power of the President to call out troops. And in Luther vs. Borden the power referred to was the authority of the Legislature of Rhode Island (not the Governor) to declare "Martial Law," and that power was given in so many words by the "charter" (which was the constitution) of the State. (See Story on the Constitution, 4th Ed., Vol. I, p. 62). Besides, Luther vs. Borden involved a situation of rebellion in fact.

Each of the other cases cited by Appellants likewise involved conditions of actual violence, to such extents, in some instances, as to lead the Courts to predicate the decisions made on findings of such war conditions as had effectually closed the Courts and had, of themselves, suspended all civil law (this being notably true in respect of the West Virginia cases).

Of some of the other cases cited by the Appellants some particular, but brief, notice will be taken.

State Ex. Rel. Mays vs. Brown (*W. Va.*) 77 *S. E.* 243, 45 *L. R. A.* (*N. S.*) 996:

The decision in this case (rendered despite a vigorous dissent) is based primarily upon a holding that such actual state of war existed as to effectually close the courts and of itself to suspend civil rights

and remedies, and under State law which was held to give in express terms the authority exercised by the Governor. The Majority Opinion, it will be noticed, denounces the reasoning and the results in Ex Parte Milligan. And the West Virginia constitution did not include (as the Texas constitution does include) a provision against suspension of the laws by officers other than the Legislature.

In Re Moyer, 35 *Col.* 159, 85 *Pac.* 190; 12 *L. R. A. (N. S.)* 979; *Moyer vs. Peabody*, 148 *Fed.* 870; *Moyer vs. Peabody*, 212 *U. S.* 78:

These cases involved occurences during period of actual violence. The constitution of Colorado (unlike that of Texas) conferred on the Governor 'the supreme executive power of the State' (Sec. 1, Art. IV); the constitution of Colorado (unlike that of Texas) also allowed suspension of the writ of *habeas corpus* and its privileges when public safety required it in case of insurrection, etc. (Sec. 21, Art. I), and that constitution (unlike that of Texas) did not contain a provision against suspension of the laws. Statutes of the State as construed by the Supreme Court of the State and by implication, at least, vested in the Governor the power claimed by him. The Colorado Court, in its opinion, recognized the fact that the power claimed by implication could not be upheld if the implication should run counter to any expressed provision of the law; hence, it is

reasonable to believe, the Colorado Court would have made decision the exact reverse of that which it did make if the Colorado constitution had been like that of Texas. The decision of the Federal Courts rest, at last, upon the construction of the State law given by the State Court. And in respect of the decision by the Supreme Court of the United States, it is noted that Moyer did not make or present allegations or proof of bad faith in the Governor or of arbitrary and capricious action by him; it is noted, also, that Justice Holmes plainly indicated that the acts of "discretion" of the Governor might, in a proper case, be reviewed and relieved against.

In Re Boyle (*Idaho*) 45 *L. R. A.* 832:

The constitution of Idaho is unlike that of Texas in the following respects First: The supreme executive power of the State" is there vested in the Governor (Sec. 5, Art. IV); second, there is no constitutional provision expressly forbidding suspension of the laws; third, there *habeas corpus* may be suspended for the public safety in case of insurrection, etc. (Sec. 5, Art. I).

UNITED STATES VS. FISCHER, 280 Fed. 208:

The Nebraska constitution, under which this case was decided, is unlike that of Texas in the following respects: First, "The supreme executive authority of the state is vested in the Governor" (Sec. 6, Art.

V); second, there is in it no expressed prohibition of suspension of the laws; third, habeas corpus may be suspended on occasion of public danger account of insurrection, etc. (Sec. 8, Art. I). The actual situation as to violence, etc., there involved was entorely different from that shown in the present case.

COMMONWEALTH Ex. Rel. WORDSWORTH vs. SHORTALL, 206 Pa. 165, 65 L. R. A. 193; By the constitution of Pennsylvania the "supreme executive authority of the state" is given to the Governor (Sec. 2, Art. IV); under its terms the writ of habeas corpus may be suspended, at least by legislative authority, and the laws may be suspended by authority of the Legislature; in all these respects the constitution of that State is unlike that of Texas. Violence in fact, so much so as, in the judgement of the court, to work suspension of law and thwarting of civil precess existed, as compared with a purely imagined possibility of violence in the present instance.

EX PARTE McDONALD, 49 Mont. 454, 143 Pac. 947, L. R. A. 1915-B, 988: By the constitution of Montana the "supreme executive authority of the state" is vested in the Governor (Sec. 5, Art. VII), suspension of habeas corpus is allowed (Sec. 21, Art. 3) and suspension of laws is not expressly forbidden; in each respect the constitution of Texas is

different. Actual violence existed there; none here. And, in truth the opinion (in Ex Parte McDonald) denounces much of the argument made here in behalf of the Defendants. Generally, these observations may justly be taken of the Kentucky case cited by Defendants and of the respects in which the Kentucky constitution differs from that of Texas.

We have stated that the Texas Constitution (of 1876 is distinctive. We again call attention to that fact by way of anticipative answer to a case from any State that may yet be cited by the Appellants. Arkansas and Ohio, of all the states, have constitutional provisions like our Sec. 28 of Art. I (expressly forbidding suspension of laws except by the Legislature itself); but the constitutions of Arkansas differs from ours in that (in Sec. 11, Art. I) suspension of *habeas corpus* is allowed and in that (by Sec. 2, Art. I.) "the supreme executive authority of the state" is vested in the Governor and exactly the same differences (from the Texas document) appear in Sec. 8, Art. I and Sec. 5, Art. III, of the constitution of Ohio. Expressed provision against suspension of laws is lacking in the constitution of thirty-four states; in the constitutions of twelve other states there are expressed prohibitions of suspension of laws "except by the Legislature or its authority." By the constitutions of thirty-one (or more) States *habeas corpus* is allowed to be sus-

pended in event of public danger account of insurrection, etc. By the constitutions of twenty-eight states "the supreme executive power of the state" is vested in the Governors, in those of nine other states "the executive power" of the state is given to the governors, and in the constitutions of each of six other states "the chief executive power" is put in the governor. And "Law Martial" has expressed recognition in the constitutions of Massachusetts (Par. 28 of Part 1st), New Hampshire (Art. 34, Part. 1st), Vermont (Art. 17, Ch. I) and Rhode Island (Sec. 18, Art. I). And in the terms or intendments of our constitution, we say, there is not to be found warrant for "Martial Rule" (or such a "Rule" as the Appellants have inaugurated) at all, at least not by executive authority.

It results, we say that there is in the Governor of Texas no "discretion" such as is claimed for him and, hence, that his attempts to exercise it may lawfully be challenged—at any time or place on ground of bold unsurpation.

But if in our view of State law we be mistaken, and if it be true that Texas has undertaken to confer such power upon the Governor, yet vesting of the power and/or its use (in the manner and to the extent it has been and is being used against Appellees and their properties) was and is void for each and

all of the reasons assigned in the opening pages of this Argument. In any event the facts do not justify what has been done and what is being proposed by Defendants. Ex. Parte Milligan, 4 Wall 2, 18 L. Ed. 281; Mitchell vs. Harmony, 13 How.___.

And if (contrary to the precedent of Davis, Governor of Texas vs. Gray, 16 Wall, and contrary to what is generally stated in United States vs. Lee, 106 U. S.) it be true that preventive process may not operate directly upon the Governor, still there is lacking all warrant for attributing sacrosancy to General Wolters or other subordinates (United States vs. Lee, 106 U. S.; Mitchell vs. Harmony, 13 How.)

Appellants admit that the acts complained of may be judicially reviewed in the future and civil or criminal libility adjudged. They suggest a damage suit as the available remedy. Yet in the case there is admission of insolvency; basic equity, therefore, exists and Appellees ought not be remitted to a futile proceedure.

Respectfully submitted,

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Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES.

Nos. 11 and 453.—October Term, 1932.

R. S. Sterling, Governor of the State of Texas, et al., Appellants, *vs.* E. Constantin, et al. . } Appeals from the District Court of the United States for the Eastern District of Texas.

[December 12, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The District Court, composed of three judges (U. S. C., Tit. 28, sec. 380), granted an interlocutory injunction restraining the appellants, Ross S. Sterling, Governor of the State of Texas, W. W. Sterling, Adjutant General of the State, and Jacob F. Wolters, Brigadier General of the Texas National Guard, from enforcing their military or executive orders regulating or restricting the production of oil from complainants' wells and from interfering in any manner "with the lawful production of oil from complainants' property". 57 F. (2d) 227. By stipulation, causes of action set forth in the amended bill of complaint against these defendants and others were severed and the suit proceeded to trial upon the merits against these defendants separately and was submitted upon the pleadings and the evidence taken on the application for the interlocutory injunction. The court entered final judgment making the interlocutory injunction permanent, and appeals have been taken to this Court from both the interlocutory order and the final judgment. As the case is now here on the latter appeal (No. 453), the appeal from the interlocutory order (No. 11) will be dismissed. *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, 224.

Complainants, as owners of interests in oil and gas leaseholds, originally brought the suit, on October 13, 1931, against members of the Railroad Commission of Texas, the Attorney General of the State, Brigadier General Wolters, and others, to restrain the enforcement of orders of the Commission limiting the production of

oil. These orders were alleged to be arbitrary and illegal, as having been made in violation of the statutes of Texas and in pursuance of a conspiracy in the interest of prices, and as operating to deprive complainants of their property without due process of law contrary to both the State and the Federal constitutions. The District Judge set the application for preliminary injunction for hearing on October 28, 1931, before a specially constituted court of three judges, and meanwhile made a temporary order restraining the defendants from limiting complainants' production below 5,000 barrels per well. 57 F. (2d) p. 229. The defendants who were members of the Railroad Commission accordingly ceased their attempt to enforce the orders thus challenged.

Previously, on August 16, 1931, Governor Sterling had issued a proclamation stating that certain counties (in which complainants' properties were located) were in "a state of insurrection, tumult, riot, and a breach of the peace", and declaring "martial law" in that territory. The Governor directed Brigadier General Wolters to assume supreme command of the situation and to take such steps as he might deem necessary in order "to enforce and uphold the majesty of the law", subject to the orders of the Governor as Commander in Chief, as given through the Adjutant General. From that time, General Wolters acted as "commanding officer of said military district".

When the District Court made its temporary restraining order in this suit, as above stated, Governor Sterling, learning that the orders made by the Railroad Commission could no longer be enforced, issued his oral and written orders to General Wolters to limit the production of oil in the described military district to 165 barrels per well per day. This was the limit fixed by the Commission's order of October 10th the enforcement of which was subject to the restraining order. On October 28th, the Governor made the limit 150 barrels and on November 6th, 125 barrels. These orders were enforced by General Wolters, and contempt proceedings were brought against him.

On November 20, 1931, by leave of the District Court, complainants filed an amended bill making Governor Sterling and W. W. Sterling, Adjutant General, parties to the suit and alleging that the above mentioned military and executive orders limiting production were without justification in law or in fact, were arbitrary

and capricious, and were repugnant to the State and Federal constitutions. Complainants alleged that there had been no request by the civil authorities for the use of the military forces; that all courts in said area were "open and transacting their ordinary business"; that there were "no armed bodies of civilans in said area" nor "any bodies of men threatening bloodshed, violence or destruction"; but that, on the contrary "the citizens in said community are in a quiet, peaceable condition and amenable and obedient to any process which might be served upon them". Defendants, Governor Sterling, Adjutant General Sterling, and General Wolters, answered the bill setting forth the executive proclamation and orders, and the declaration of martial law, and asserting the validity of the acts assailed. By a supplemental petition, in response to the answer, complainants denied that the Governor, under the constitution and statutes of the State, could lawfully exercise the authority he had assumed and specifically alleged that if any statute of the State conferred such authority it contravened stated provisions of the Constitution of the State and the due process and equal protection clauses of the Fourteenth Amendment. At the time of the hearing of the application for preliminary injunction, it appeared that the executive orders had further limited the complainants' production to 100 barrels per day. 57 F. (2d) p. 229.

Upon that application, the District Court received the evidence submitted by both parties, and considering it to be "without substantial conflict", stated that it established the following facts:

In August, 1931, the Legislature of Texas passed an amended oil and conservation act. Chap. 26, Vernon's Ann. Civ. St. Texas, Arts, 6008, 6014, 6029, 6032, 6036, 6049c. The Governor in issuing his proclamation of August 16th recited the provisions of the constitution and statutes of Texas for the conservation of oil and gas and the existence in the East Texas oil field, the territory in question, of an organized group of oil and gas producers who were said to be in a state of insurrection against the conservation laws; that the civil officers did not have a sufficient force to compel them to obey; that by reason of their reckless production enormous physical waste was being created; that this condition had brought about such a state of public feeling that if the state government could not protect the public's interest they would take the law into

their own hands; that this condition had caused threats of acts of violence; that it was necessary to give the Railroad Commission time to have hearings and promulgate proper orders to put the law into force; that a state of "insurrection, tumult, riot and breach of the peace existed in the defined area" and that there was "serious danger threatening to citizens and property, not only there, but in other oil producing areas of the State"; and that it was necessary "that the reckless and illegal exploitation" should be stopped until such time as the said resources might be properly conserved and developed under the protection of the civil authorities. The troops were then called out and the oil wells were shut down. In September, after the Commission had made its order limiting production, while the proclamation of martial law was not rescinded nor the troops entirely withdrawn, the military occupation in force ended. The wells were opened and continued to produce daily under the order of the Railroad Commission. General Wolters, with the assistance of the "Rangers", the civil officers of the community, and "the few military still remaining in the field", and in aid of the Commission, patrolled the territory to see that its orders were complied with; that from time to time the Commission, sometimes with the approval, and sometimes with the disapproval, of the Governor made its orders further limiting production, and these orders were obeyed.

The District Court also found that after the restraining order against the Commission had been issued in this suit, the defendants, Governor Sterling and General Wolters, "determined not to brook court interference with the program of restricted production which they determined to continue." Acting "in the real, though mistaken, belief that the Federal court, while competent as to the Commission, was during the continuance of the proclaimed state of war without jurisdiction over their action," by virtue of the claim, which the District Court found to be wholly without support in the evidence, "that war conditions were prevailing in the field, and that military necessity required the action," they "ousted the Commission from the fixing of and superintendence over the daily production allowed, and have since controlled production by purported military orders".

As to the actual conditions in the area affected by these orders the District Court made the following finding:

"It was conceded that at no time has there been any actual uprising in the territory. At no time has any military force been exerted to put riots or mobs down. At no time, except in the refusal of defendant Wolters to observe the injunction in this case, have the civil authorities or courts been interfered with or their processes made impotent. Though it was testified to by defendants that from reports which came to them they believed that, if plaintiffs' wells were not shut in, there would be dynamiting of property in the oil fields, and efforts to close them and any others which opened by violence, and that, if that occurred, there would be general trouble in the field, no evidence of any dynamite having been used, or show of violence practiced or actually attempted, or even threatened against any specific property in the field, was offered. We find, therefore, that not only was there never any actual riot, tumult, or insurrection, which would create a state of war existing in the field, but that, if all of the conditions had come to pass, they would have resulted merely in breaches of the peace to be suppressed by the militia as a civil force, and not at all in a condition constituting, or even remotely resembling, a state of war." 57 F. (2d) p. 231.

Referring to the testimony of Governor Sterling and General Wolters that the orders had not been issued for the purpose of affecting prices, nor even *per se* to limit production, but "as acts of military necessity to suppress actually threatened war" as they believed from reports brought to them that "unless they kept the production of oil down to within 400,000 barrels, a warlike riot and insurrection, in fact a state of war, would ensue," the District Court said:

"We find no warrant in the evidence for such belief. Looking at it in the light most favorable to defendants' contention, it presents nothing more than threats of violence or breaches of the peace. The testimony showed that martial law had not ousted the commission from making and enforcing rules regulating conservation, except alone as to production from the field. One of their witnesses testified: 'Now the Governor with his military representatives has taken over the proration end but the conservation end is still with the Commission.' The evidence shows no insurrection nor riot, in fact, existing at any time in the territory, no closure of the courts, no failure of civil authorities. It shows that at no time has there been in fact any condition resembling a state of war, and that, unless the Governor may by proclamation create an irrebutable presumption that a state of war exists, the actions of the Governor and his staff may not be justified on the ground of military necessity". *Id.*

Having thus found the facts, the District Court, maintaining its jurisdiction, examined the provisions of the constitution and statutes of the State to ascertain whether they had conferred upon the Governor the power he had assumed to exercise. The court concluded that not only was no such affirmative authority conferred but that express provisions of the constitution withheld such power; that when the Governor calls out the troops of Texas, it is not as a military but as a civil officer; that their powers and duties are derived from the civil law; and that at no time and under no conditions are their actions above court review. The court held that, under the constitution of Texas, courts may not be closed or their processes interfered with by military orders, that courts cannot be ousted by the agencies detailed to aid them, and that their functions cannot be transferred to tribunals unknown to the constitution. In this view, the court decided that appellants "without warrant of law" had been depriving complainants of their undoubted right to operate their own properties in a prudent and reasonable way, in accordance with the laws of the State. 57 F. (2d) pp. 236-241. The final judgment, entered pursuant to the stipulation of the parties and upon the same record, rests upon the same findings and conclusions.

Appellants contend (1) that the Governor has power to declare martial law; (2) that courts may not review the sufficiency of facts upon which martial law is declared; (3) that courts may not control by injunction the means of enforcing martial law; and (4) that the finding of the Governor of necessity to take property is due process of law.

First. The District Court had jurisdiction. The suit is not against the State. The applicable principle is that where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the Federal courts in order that the persons injured may have appropriate relief. *Ex parte Young,* 209 U. S. 123, 155, 156; *Home Telephone & Telegraph Co.* v. *Los Angeles,* 227 U. S. 278, 292, 293; *Truax* v. *Raich,* 239 U. S. 33, 37, 38; *Cavanaugh* v. *Looney,* 248 U. S. 453, 456; *Terrace* v. *Thompson,* 263 U. S. 197, 214. The Governor of the State, in this respect, is in no different position from that of other state officials. See *Davis* v. *Gray,* 16 Wall. 203, 210, 233; *Continental Baking Co.* v. *Woodring, Governor of Kansas, et al.,* 286 U. S. 352; *Binford et al.* v. *McLeaish,* 284

U. S. 598; 52 F. (2d) 151, 152; *Sproles* v. *Binford et al.*, 286 U. S. 374. Nor does the fact that it may appear that the state officer in such a case, while acting under color of state law, has exceeded the authority conferred by the State, deprive the court of jurisdiction. *Iowa-Des Moines Bank* v. *Bennett*, 284 U. S. 239, 246; *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 434.

As the validity of provisions of the state constitution and statutes, if they could be deemed to authorize the action of the Governor, was challenged, the application for injunction was properly heard by three judges. *Stratton* v. *St. Louis Southwestern Rwy. Co.*, 282 U. S. 10. The jurisdiction of the District Court so constituted, and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case. *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, 191; *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298, 303; *Davis* v. *Wallace*, 257 U. S. 478, 482; *Waggoner Estate* v. *Wichita County*, 273 U. S. 113, 116.

Second. Appellants rely upon Article IV, sections 1, 7 and 10 of the state constitution, and Articles 5778, 5830, 5834 and 5889 of the Revised Civil Statutes of the State, 1925. The provisions of the state constitution make the Governor the Chief Executive Officer of the State and Commander in Chief of its military forces, with "power to call forth the militia to execute the laws of the State, to suppress insurrections, repel invasions, and protect the frontier". The Governor "shall cause the laws to be faithfully executed". The statutes cited are set forth in the margin.[1]

In support of the conclusion of the court below that the Governor did not have authority as extensive as that asserted in this case, appellees invoke the provisions of the Bill of Rights (Article I) of the state constitution as follows:

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[1] "Revised Civil Statutes of Texas, 1925:

"Art. 5778. The Governor shall have power in the case of insurrection, invasion, tumult, riot or breach of peace, or imminent danger thereof, to order into the active service of this State any part of the militia that he may deem proper.

"Art. 5830. When an invasion of, or an insurrection in, this State is made or threatened, or when the Governor may deem it necessary for the enforcement of the laws of this State, he shall call forth the active militia or any part thereof to repel, suppress, or enforce the same, and if the number avail-

"Sec. 12: The writ of *habeas corpus* is a writ of right, and shall never be suspended . . . .

"Sec. 24: The military shall at all times be subordinate to the civil authority.

"Sec. 28: No power of suspending laws in this State shall be exercised except by the Legislature.

"Sec. 29: To guard against transgressions of the high powers herein delegated, we declare that everything in this 'Bill of Rights' is excepted out of the general powers of the government and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void".

Appellees contend that the subsequent Articles of the Constitution are to be construed in harmony with these provisions of the Bill of Rights, and that these show clearly that it was not the intention of the people of Texas to confer upon the Governor the authority to declare martial law, but only to suppress insurrections, to repel invasions and to afford the protection necessary to preserve the peace, acting in aid, and not in subversion, of the civil authority and of the jurisdiction of the courts. These provisions, said the District Court, "were written into the fundamental law as direct inhibitions upon the executive, by men who had suffered under the imposition of martial law, with its suspension of civil authority, and the ousting of the courts during reconstruction in Texas". "In every convention", said the court, "in every gathering assembled, protesting the suppression of free speech, the interference with the processes, the judgments, the decrees of courts, these men had denounced martial tyranny, and sought relief against it, and, when they met to adopt the constitution of 1876 which still obtains, they determined to, and they did, so write

able is insufficient he shall order out such part of the reserve militia as he may deem necessary.

"Art. 5834. The Governor may order the active militia, or any part thereof, to assist the civil authorities in guarding the prisoners, or in conveying prisoners from and to any point in this State, or discharging other duties in connection with the execution of the law as the public interest or safety at any time may require.

"Art. 5889. Whenever any portion of the military forces of this State is employed in aid of the civil authority, the Governor, if in his judgment the maintenance of law and order will thereby be promoted, may, by proclamation, declare the county or city in which the troops are serving, or any special portion thereof, to be in a state of insurrection".

the fundamental law that such deprivations of liberty might never again occur". 57 F. (2d) p. 237.

While we recognize the force of these observations, and the question of the interpretation of the provisions of the state constitution is before us, it is still a matter of local law, as to which the courts of the State would in any event have the final word. We do not find it necessary to determine that question and we shall not attempt to explore the history of Texas or to review the decisions of the state courts cited by the appellees.[2] We pass to the consideration of the federal question presented, and for that purpose we shall assume, without deciding, that the law of the State authorizes what the Governor has done.

Third. The existence and nature of the complainants' rights are not open to question. Their ownership of the oil properties is undisputed. Their right to the enjoyment and use of these properties subject to reasonable regulation by the State in the exercise of its power to prevent unnecessary loss, destruction and waste, is protected by the due process clause of the Fourteenth Amendment. *Ohio Oil Company* v. *Indiana*, 177 U. S. 190; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61; *Walls* v. *Midland Carbon Co.*, 254 U. S. 300; *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210. The State, in this instance, had asserted its regulatory authority by enacting laws for the prevention of waste and had empowered the Railroad Commission to investigate and to establish rules to this end. The Commission then made its orders governing and limiting oil production. The complainants brought suit in the Federal court to restrain the enforcement of these orders upon the ground that they were unauthorized, arbitrary and capricious, and violated the Federal right to the

[2]Ex parte Coupland, 26 Tex. 387; Ex parte Turman, 26 Tex. 708; Ex parte Mayer, 27 Tex. 716; State *v.* Sparks and Magruder, 27 Tex. 627; *id.*, 705; The Emancipation Cases, 31 Tex. 504; Arroyo *v.* State, 69 S. W. 504. See, also, Franks *v.* Smith, 142 Ky. 232; Fluke *v.* Canton, 31 Okla. 718; Bishop *v.* Vandercook, 228 Mich. 299; Ex parte McDonald, 49 Mont. 454; Herlihy *v.* Donohue, 52 Mont. 601; Allen *v.* Gardner, 182 N. C. 435. Compare State *ex rel.* Mays *v.* Brown, 71 W. Va. 519; In re Jones, 71 W. Va. 567; Hatfield *v.* Graham, 73 W. Va. 759; Ex parte Lavinder, 88 W. Va. 713; In re Moyer, 35 Colo. 159; In re Boyle, 6 Idaho 609; Commonwealth *ex rel.* Wadsworth *v.* Shortall, 206 Pa. St. 165.

enjoyment and use of the properties. Exercising the jurisdiction conferred by Federal statute, a Federal Judge had granted a temporary restraining order, pending the convening of the court which by that statute was charged with the duty to determine whether the requirement of the Commission was valid or its enforcement should be enjoined. While this orderly process was going forward, it was superseded and in effect nullified by the Governor of the State who undertook by military order to effect the limitation which the Commission by that process was for the time being forbidden to maintain. And when the Federal court, finding his action to have been unjustified by any existing exigency, has given the relief appropriate in the absence of other adequate remedy, appellants assert that the court was powerless thus to intervene and that the Governor's order had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.

If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the Federal judicial power extends (Art. III, sec. 2) and, so extending, the court has all the authority appropriate to its exercise. Accordingly, it has been decided in a great variety of circumstances that when questions of law and fact are so intermingled as to make it necessary, in order to pass upon the Federal question, the court may, and should, analyze the facts. Even when the case comes to this Court from a state court this duty must be

performed as a necessary incident to a decision upon the claim of denial of Federal right. *Kansas City Southern Rwy. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 591; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *Northern Pacific Rwy. Co.* v. *North Dakota*, 236 U. S 585, 593; *Union Pacific R. R. Co.* v. *Public Service Commission*, 248 U. S. 67, 69; *Merchants National Bank* v. *Richmond*, 256 U. S. 635, 638; *First National Bank* v. *Hartford*, 273 U. S. 548, 552, 553; *Fiske* v. *Kansas*, 274 U. S. 380, 385, 386.

Fourth. The application of these principles does not fail to take into account the distinctive authority of the State. In the performance of its essential function, in promoting the security and well-being of its people, the State must, of necessity, enjoy a broad discretion. The range of that discretion accords with the subject of its exercise. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 31; *Standard Oil Company* v. *Marysville*, 279 U. S. 582, 584; *Ohio Oil Company* v. *Conway*, 281 U. S. 146, 159. As the State has no more important interest than the maintenance of law and order, the power it confers upon its Governor as Chief Executive and Commander in Chief of its military forces to suppress insurrection and to preserve the peace is of the highest consequence. The determinations that the Governor makes within the range of that authority have all the weight which can be attributed to state action, and they must be viewed in the light of the object to which they may properly be addressed and with full recognition of its importance. It is with appreciation of the gravity of such an issue that the governing principles have been declared.

By virtue of his duty to "cause the laws to be faithfully executed", the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive. That construction, this Court has said, in speaking of the power constitutionally conferred by the Congress upon the President to call the militia into actual service, "necessarily results from the nature of the power itself, and from the manifest object contemplated". The power "is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union." *Martin* v. *Mott*, 12 Wheat. 19, 29, 30. Similar effect, for corresponding reasons, is ascribed to

the exercise by the Governor of a State of his discretion in calling out its military forces to suppress insurrection and disorder. *Luther* v. *Borden,* 7 How. 1, 45; *Moyer* v. *Peabody,* 212 U. S. 78, 83. The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace. Thus, in *Moyer* v. *Peabody, supra,* the Court sustained the authority of the Governor to hold in custody temporarily one whom he believed to be engaged in fomenting disorder, and right of recovery against the Governor for the imprisonment was denied. The Court said that, as the Governor "may kill persons who resist", he "may use the milder measures of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief". In that case it appeared that the action of the Governor had direct relation to the subduing of the insurrection by the temporary detention of one believed to be a participant, and the general language of the opinion must be taken in connection with the point actually decided. *Cohens* v. *Virginia,* 6 Wheat. 264, 399; *Carroll* v. *Carroll,* 16 How. 275, 287; *Myers* v. *United States,* 272 U. S. 52, 142.

It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military

discretion, and whether or not they have been overstepped in a particular case, are judicial questions. Thus, in the theatre of actual war, there are occasions in which private property may be taken or destroyed to prevent it from falling into the hands of the enemy or may be impressed into the public service and the officer may show the necessity in defending an action for trespass. "But we are clearly of opinion", said the Court speaking through Chief Justice Taney, "that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. . . . Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified." *Mitchell* v. *Harmony*, 13 How. 115, 134. See, also, *United States* v. *Russell*, 13 Wall. 623, 628. There is no ground for the conclusion that military orders in the case of insurrection have any higher sanction or confer any greater immunity.

We need not undertake to determine the intended significance of the expression "martial law", and all its possible connotations, as it was employed in the Governor's proclamation. Nor are we concerned with the permissible scope of determinations of military necessity in all their conceivable applications to actual or threatened disorder and breaches of the peace. Fundamentally, the question here is not of the power of the Governor to proclaim that a state of insurrection, or tumult, or riot, or breach of the peace exists, and that it is necessary to call military force to the aid of the civil power. Nor does the question relate to the quelling of disturbances and the overcoming of unlawful resistance to civil authority. The question before us is simply with respect to the Governor's attempt to regulate by executive order the lawful use of complainants' properties in the production of oil. Instead of affording them protection in the lawful exercise of their rights as determined by the courts, he sought, by his executive orders, to make that exercise impossible. In the place of judicial procedure, available in the courts which were open and functioning, he set up his executive commands which brooked neither delay nor appeal. In particular, to the process of the Federal court actually and properly engaged in examining and protecting an asserted Federal

right, the Governor interposed the obstruction of his will, subverting the Federal authority. The assertion that such action can be taken as conclusive proof of its own necessity and must be accepted as in itself due process of law has no support in the decisions of this Court.

Appellants' contentions find their appropriate answer in what was said by this Court in *Ex parte Milligan*, 4 Wall. 2, 124, a statement as applicable to the military authority of the State in the case of insurrection as to the military authority of the Nation in time of war: "The proposition is this: That in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will;* and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States. If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules. The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law established on such a basis, destroys every guarantee of the Constitution, and effectually renders the military independent of and superior to the civil power. . . . Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish".

Fifth. The argument of appellants intimates, while it reserves the question, that it may be possible for the courts to call upon the Governor, after the alleged emergency has passed, to account for what he has done, but that they may not entertain a proceeding for injunction. The suggestion confuses the question of judicial power with that of judicial remedy. If the matter is one of judicial cognizance, it is because of an alleged invasion of a right, and the judicial power necessarily extends to the granting of the relief

found to be appropriate according to the circumstances of the case. Whether or not the injured party is entitled to an injunction will depend upon equitable principles; upon the nature of the right invaded and the adequacy of the remedy at law. If the court finds that the limits of executive authority have been transgressed, and that in view of the character of the injury equitable relief by injunction is essential in order to afford the protection to which the injured party is entitled, it can not be said that the judicial power is fettered because the injury is attributable to a military order.

In the present case, the findings of fact made by the District Court are fully supported by the evidence. They leave no room for doubt that there was no military necessity which, from any point of view, could be taken to justify the action of the Governor in attempting to limit complainants' oil production, otherwise lawful. Complainants had a constitutional right to resort to the Federal court to have the validity of the Commission's orders judicially determined. There was no exigency which justified the Governor in attempting to enforce by executive or military order the restriction which the District Judge had restrained pending proper judicial inquiry. If it be assumed that the Governor was entitled to declare a state of insurrection and to bring military force to the aid of civil authority, the proper use of that power in this instance was to maintain the Federal court in the exercise of its jurisdiction and not to attempt to override it; to aid in making its process effective and not to nullify it, to remove, and not to create, obstructions to the exercise by the complainants of their rights as judicially declared. It is also plain that there was no adequate remedy at law for the redress of the injury and, as the evidence showed that the Governor's orders were an invasion under color of state law of rights secured by the Federal Constitution, the District Court did not err in granting the injunction.

The judgment of the District Court is affirmed.

No. 11, appeal dismissed.
No. 453, judgment affirmed.